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The Democratic Republic of Congo

1 Introduction

The Constitution of the Democratic Republic of Congo (2006 DRC Constitution or the Constitution) created a Constitutional Court (Court) on which was conferred a mandate to protect and uphold the Constitution through various procedures.[1] The Court has been operating for 20 years now, first as a constitutional chamber of the Supreme Court of Justice (between 2006 and 2015)[2] and then, since April 2015, as an autonomous Constitutional Court.[3] It has produced a wealth of

1 Arts 157-169 of the 2006 DRC Constitution; arts 42-87 of the Organic Act 13/026 of 15 October 2013 Governing the Organisation and Functioning of the Constitutional Court (the Court Act). See generally J-PM Mvumbi-di-Ngoma *La justice constitutionnelle en République Démocratique du Congo: Aperçu sur la compétence de la Cour constitutionnelle et la procédure devant cette haute juridiction* (2018) 29.

2 M Wetsh'Okonda Koso Senga *La protection des droits de l'homme par le juge constitutionnel congolais: Analyse critique et jurisprudence* (2016). The following judgements discussed in this chapter were delivered by the Supreme Court of Justice acting as Constitutional Court: Judgment R.Const. 04/TSR of 3 October 2003; Advisory Opinion RL 09 of 20 January 2004; Judgment RConst. 051/TSR of 31 July 2007; Judgment R.Const. 062/TSR of 26 December 2007; Judgment R.Const. 060/TSR of 28 December 2007; Judgment R.Const. 078/TSR of 4 May 2009; Judgment RConst. 113/TSR of 26 March 2010; Judgment R.Const. 103/106/TSR of 7 June 2010; Judgment R.Const. 137/TSR of 22 October 2010; Judgment R.Const. 152/TSR of 26 April 2011; Judgment R.Const. 166/TSR of 19 August 2011; Judgment R.Const. 250/TSR of 11 March 2015.

3 'Kinshasa: les membres de la Cour constitutionnelle ont prêté serment' (*Radio Okapi*, 4 April 2015) https://www.radiookapi.net/actualite/2015/04/04/kinshasa-les-membres-de-la-cour-constitutionnelle-ont-prete-serment (accessed 17 June 2025). The following judgements discussed in this chapter were delivered by the Constitutional Court: Judgment R.Const. 0038 of 28 August 2015; Judgment R.Const. 0089/2015 of 8 September 2015; Judgment R.Const. 126 of 21 November 2015; Judgment R.Const. 168 of 21 November 2015; Judgment R.Const. 0003bis of 12 December 2015; Judgment R.Const. 0002/126/TSR of 17 December 2015; Judgment R.Const. 0070 of 17 December 2015; Judgment R.Const. 0007 of 29 January 2016; Judgment R.Const. 0005 of 19 February 2016; Judgment R.Const. 155 of 29 April 2016; Judgment R.Const. 232/2016 of 10 June 2016; Judgment R.Const. 212/216/2016 of 10 June 2016; Judgment R.Const. 356 of 10 March 2017; Judgment R.Const. 469 of 26 May 2017; Judgment R.Const. 624/630/631 of 30 March 2018; Judgment RCE 004 of 3 September 2018; Judgment RCE 002 of 3 September 2018; Judgment RCE 0005/0006/PR

judgments that have impacted on the protection and the promotion of human rights.[4] Through this jurisprudence, the Court has protected the constitutional order, enhanced democratic principles and ensured that state organs abide by the ideals embodied in the Constitution. Although the Court's activism may be critiqued for its emphasis on protecting the right to defence and for its excessive judicial deference to the ruling coalition's policy preferences, its case law nonetheless reveals a potential to serve as a final safeguard of fundamental rights.

In this chapter, I explain and evaluate the Constitutional Court's interpretive approaches and their implications for promoting a culture for human rights protection in the DRC. The evaluation pertains

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of 3 September 2018; Judgment RCE 001/PRCR of 19 January 2019; Judgment R. Const. 1272 of 4 December 2020; Judgment R.Const. 1453/1463/1464 of 15 January 2021; Judgment R.Const. 150 of 6 May 2021; Judgment R.Const. 1800 of 22 July 2022; Judgment R.Const. 1879 of 20 December 2022; Judgment R.Const. 1703 of 8 February 2022; Judgment R.Const. 1816 of 18 November 2022; Jugdment R.Const. 2120 of 14 December 2023; Judgment R.Const. 1737/1738/1739/1740/1741 of 3 May 2022; Judgment R.Const. 1954 of 27 April 2023; Judgment R.Const. 1751 of 3 May 2022; and Judgment R.Const. 1826 of 29 December 2022.

4 See some illustrations in: A-DN Luaba Lumu 'Role of the constitutional judge in the settlement of electoral disputes: State of play, challenges and prospects' (2018) 3 *Annuaire congolais de justice constitutionnelle* xxii; SK Nkashama 'Le juge électoral congolais: Étendue des pouvoirs et moyens d'action dans le règlement des contentieux de candidature et de résultats' (2018) 3 *Annuaire congolais de justice constitutionnelle* 62; RM Kalubi 'La nouvelle compétence de la Cour constitutionnelle fondée sur la protection des droits humains: Une lecture critique de l'arrêt R.Const. 0038 du 20 août 2015' (2016) 1 *Annuaire congolais de justice constitutionnelle* 207; JC Hengelela 'Droit d'un élu au retour dans une assemblée parlementaire: Etude critique des arrêts R.Const. 189/TSR de la Cour suprême de justice du 18 novembre 2013 et R.Const. 126 de la Cour constitutionnelle du 21 novembre 2015' (2016) 1 *Annuaire congolais de justice constitutionnelle* 303-304; L Mitundukidi & GB Ekomene 'L'incompétence de la Cour constitutionnelle à l'égard du contentieux de l'élection des gouverneurs de province: Une étude de l'arrêt R.Const. 232/2016 du 10 juin 2016' (2018) 3 *Annuaire congolais de justice constitutionnelle* 480; M Wetsh'Okonda Koso Senga 'A propos du pouvoir de "régulation de la vie politique" par la Cour constitutionnelle congolaise: Une analyse de l'arrêt R.Const. 0089/2015 du 8 septembre 2015' (2016) 1 *Annuaire congolais de justice constitutionnelle* 225; CT Banungana 'A propos de l'arrêt R.Const. 0014 du 10 juin 2015 sur l'appréciation de la conformité à la Constitution de la loi organique modifiant et complétant la loi-organique No. 06/020 du 10 octobre 2006 portant statut des magistrats' (2016) 1 *Annuaire congolais de justice constitutionnelle* 552; M Wetsh'Okonda Koso Senga 'Brèves reflexions sur l'opinion dissidente émise en marge de l'arrêt R.Const. 624/630/631 du 30 mars 2018 relative à la constitutionnalité de la loi électorale révisée' (2018) 3 *Annuaire congolais de justice constitutionnelle* 457; BL Epotu *Quelques questionnements sur la procédure devant la Cour constitutionnelle: Esquive judiciaire ou délicatesse politique face aux besoins de justice des citoyens congolais. La vision d'un politologue* (2018).

to the way the Court chooses and applies methods of constitutional interpretation in cases concerning equality and non-discrimination, rights to defence and remedy, and political rights as well as rules on substantive jurisdiction and admissibility.

2 Interpretation of substantive jurisdiction and rules on admissibility

The Constitutional Court has decided over several cases (2.1) which have shown three trends. In the first place, the Court has mobilised teleological and extra-legal arguments to expand its substantive jurisdiction (2.2) while at the same time restricting the ability of individuals to access it by using textual and formalistic arguments (2.3). In the end, the approach the Court utilises to interpret petitions brought in the interest of the public remains ambivalent (2.4) thus failing to develop a coherent approach on public interest litigation.

2.1 Overview of cases under discussion

The revival of constitutionalism in the DRC has made the Constitutional Court the last resort of governors ousted by their provincial assemblies or parliamentarians. Whilst the latter see in the Court an opportunity to protect their hard-won political rights through litigation and consistent judicialisation of political stalemates,[5] the former (the Court) sometimes plays its constitutionalism – and democracy-enhancing role[6] with vigour, and sometimes with caution or even indifference.

2.1.1 Reinvigorating the rights of political actors

When the Constitutional Court began to operate, questions about the Court's jurisdiction over a number of petitions, particularly those challenging decisions adopted by legislative assemblies that contravene the meaning and essence of individuals' rights to due process of law,

5 LOL Kos'Ongenyi *La justice constitutionnelle et la juridicisation de la vie politique en droit positif congolais* (2016). See generally R Hirschl 'The judicialisation of politics' in KE Whittington, DR Kelemen & GA Caldeira (eds) *The Oxford handbook of law and politics* (2008) 119-138.

6 D Landau 'A dynamic theory of judicial role' (2014) 55 *Boston College Law Review* 1501-1502.

came to the surface.[7] The Court was placed in a dilemma: rejecting these petitions because the Constitution and the Court Act had not conferred on it an explicit jurisdiction over such acts would mean backsliding on the promotion of constitutionalism; declaring them admissible would mean that the Court was on thin ice and acting in the absence of an explicit positive legal basis.[8] I summarise in this section the five cases where the Court chose the second alternative on which I add cases where the Court ruled over the constitutionnality of judgments handed down by other courts; while in the next section, I summarise four cases where it chose the first alternative.

The Judgment R.Const. 250/TSR of 11 March 2015 relates to an application by a former member of Senate who challenged the refusal by the Senate to reinstate him in his position. The petitioner was elected as a senator in 2006 but vacated the Senate to serve as a provincial minister and was replaced by his alternates. At the end of his ministerial position and owing to the fact that his position in Senate became vacant, he approached the Senate to organise formalities so that he could return and serve as a senator.[9] The question posed to the Court was whether the Senate's refusal to reinstate Nginayevuvu as senator could be reviewed by the Court since this did not pertain to legislation, regulations or acts having the force of legislation.[10]

The Court declared his petition admissible by arguing that

> certain provisions in the Constitution are directives and do not require implementation mechanisms. They include obligations, prohibitions, incompatibilities. Constitutional directives must be observed and their implementation reviewed. This flows from the very nature of the rule of law of which the Constitutional Court is the guardian and also the justification of the jurisdiction of the Constitutional Court to decide over behaviours that do not amount to acts or norms. From this point of view, the Constitutional Court has the power to quash norms and not words, material acts, attitudes or omissions that are contrary to the Constitution. It, however, can adjudicate them if they violate the Constitution through disobedience.[11]

7 Wetsh'Okonda Koso Senga (n 2) 95-99.
8 Wetsh'Okonda Koso Senga (n 2) 95.
9 Judgment R.Const. 250/TSR of 11 March 2015 2.
10 SKK Nkashama 'Cour constitutionnelle et contrôle de constitutionnalité en République démocratique du Congo' (2016) 1 *Annuaire congolais de justice constitutionnelle* 3.
11 Our translation. The original French reads: '*certaines prescriptions de la Constitution sont des directives et ne nécessitent pas d'actes d'exécution, il s'agit d'obligations, interdits, incompatibilités. Toutes les directives constitutionnelles doivent être respectées*

Similar reasoning was fine-tuned in the Judgment R.Const. 0038 of 28 August 2015. Ms Mungombe Musenge contested the confirmation of the first alternate as senator since he had been found guilty of embezzlement and misappropriation of funds and sentenced to 12 months' imprisonment (suspended). The Constitutional Court found that its jurisdiction could not be extended to senate resolutions. However, it noted, 'as the guardian of the Constitution, the Court is called to ensure that public authorities and citizens abide by constitutional provisions and to regulate political life'.[12]

The second string of cases pertain to governors of provinces who were ousted by their provincial assemblies in terms of articles 198, 146 and 147 of the Constitution empowering provincial legislatures to control governors and their ministers. Relevant cases include Judgment R.Const. 137/TSR of 22 October 2010,[13] Judgment R.Const. 152/TSR of 26 April 2011, Judgment R.Const. 469 of 26 May 2017 and Judgment R.Const. 356 of 10 March 2017.[14]

In Judgment R.Const. 356 of 10 March 2017, the petitioner against whom the provincial assembly adopted a vote of no-confidence alleged that the initial petition did not meet the required one-fourth threshold and that he was not given the opportunity to defend himself since he was on an official trip.[15] Whilst acknowledging that the 'vote of non-confidence' is neither legislation nor a regulation but a legislative act, the Court resolved that it had to admit the petition since it alleged the violation of fundamental rights. The Judgment R.Const. 469 of 26 May 2017 was declared admissible on similar grounds since it alleged similar facts. Interestingly, the Court argued

et contrôlées dans leur exécution. C'est la conséquence même de l'Etat de droit dont la Cour constitutionnelle est la gardienne et aussi la justification de la capacité pour la Cour constitutionnelle d'être saisie de la vérification des prescriptions qui ne se traduisent pas en actes ou normes. De ce point de vue, la Cour constitutionnelle est compétente pour annuler des normes, et pas des propos, actes matériels, attitudes ou omissions contraires à la Constitution mais elle peut en connaitre néanmoins lorsqu'il s'agit de violation par désobéissance constitutionnelle.'

12 Judgment R.Const. 0038 of 28 August 2015 7.

13 Contrary to the others, he was the President of the Provincial Assembly of Kinshasa.

14 The position in these judgments was reiterated in further cases. See generally Cour constitutionnelle *Bulletin des arrêts: Contentieux de constitutionnalité 2022-2023* (2024).

15 Judgment R.Const. 356 (n 3).

> As a state governed by the rule of law, the DRC is obligated to guarantee and uphold respect for human rights and fundamental freedoms, safeguarding against arbitrariness that may arise from both public authorities and private individuals, all of whom are subject to the rule of law. In this regard, article 150 of the Constitution designates the judiciary, including the Constitutional Court, as the guarantor of individual freedoms and fundamental rights. To prevent the emergence of lawless zones, it is essential that the Constitutional Court, as the guardian of the Constitution and the values it enshrines, assert its jurisdiction whenever violations of fundamental rights and freedoms are at stake, particularly those that enjoy special constitutional protection, such as the rights to defence and remedy, as guaranteed by articles 19 and 61 of the Constitution.[16]

The Judgment R.Const. 137/TSR of 22 October 2010 differs from the others as the petitioner was the President of the Kinshasa Provincial Assembly, who was removed by a group of parliamentarians without his being offered the opportunity to defend himself in accordance with article 19(3) and 19(4) of the Constitution.[17] The Court interpreted the notion of 'provincial assemblies' resolutions' broadly as being 'legislation' in the sense envisaged by article 162(2) of the Constitution and thus amenable to being reviewed by the Constitutional Court.[18]

The third line of jurisprudence concerns the unexpected affirmation by the Constitutional Court of its jurisdiction over judgments handed down by other apex courts, including the Council of State, the Court of Cassation, and any other court or tribunal, subject to two cumulative conditions: first, that the impugned decision violates fundamental rights afforded special protection under the current constitutional framework, such as those deemed non-derogable under article 61 of the DRC Constitution; and second, that no other legal remedy is available.[19]

This jurisprudential development is both surprising and welcome. It is surprising, firstly, because the Constitutional Court is not explicitly granted jurisdiction to review judgments of other courts, whether as a court of appeal or as a constitutional authority empowered to assess their compatibility with the Constitution. Secondly, the Court had previously declined to exercise such jurisdiction in relation to a judgment by the High Military Court, asserting that such a mandate was not envisaged under

16 Judgment R.Const. 469 of 26 May 2017.
17 Judgment R.Const. 137/TSR of 22 October 2010 reported in EM Wafwana and others *Jurisprudence. Cour suprême de justice. Contentieux constitutionnel et législatif* (2011) 77.
18 As above.
19 Judgment R.Const. 1800 of 22 July 2022.

the existing constitutional arrangement.[20] It is a welcome development, as the Court asserts its competence to subject to constitutional review any act, judicial or otherwise, that may infringe upon the Constitution. In doing so, it relies on article 60, which imposes a binding obligation on all persons, including judicial actors, to respect fundamental rights and freedoms.

2.1.2 One step forward but two steps back in protecting political rights

The vigour demonstrated by the Court in the cases presented above does not extend to other cases. In the following two cases, the Court was cautious about extending its jurisdiction to several individual petitioners. The first is Judgment R.Const. 232/2016 of 10 June 2016*,* where the Court rejected the petition on the ground that the challenged conduct – the refusal by the Electoral Commission to examine the applicant's application and its failure to retrieve the candidate's application – does not fall under the Court's material jurisdiction in electoral disputes as conferred on it by the Constitution, the Court Act and the General Electoral Act.[21] The Court argued likewise that the petition pertained to a gubernatorial election petition, which falls instead under the jurisdiction of Administrative Courts of Appeal (Court of Appeal).[22]

The second is the Judgment R.Const. 0070 of 17 December 2015. When called upon by the Provincial Assembly of Equateur to interpret whether its former MPs could return to parliament in view of article 110,[23] the Court rejected the petition because it emanated from the 'President of the Provincial Assembly' and not the 'Provincial Assembly' as an organ.[24] The case relates to the determination of the fate of 16

20 Judgment R.Const. 1272 of 4 December 2020.

21 Judgment R.Const. 232/2016 of 10 June 2016 reported in 3 *Annuaire congolais de justice constitutionnelle* (2018) 477.

22 As above.

23 On these issues, see Hengelela (n 4) 303-320; JC Hengelela 'Application du régime de suspension des mandats parlementaires à la lumière des dispositions de l'arrêt R.Const.126 de la Cour constitutionnelle' (2016) 1 *Annuaire congolais de justice constitutionnelle* 321-342.

24 Judgment R.Const. 0070 of 17 December 2015 11. See also Judgment R.Const. 0002/126/TSR of 17 December 2015 rejecting an application on the interpretation of art 99(1) of the Constitution lodged by the Prime Minister on account that the power to request interpretation is vested in the Council of Ministers, and not the Prime Minister.

former MPs who vacated their parliamentary seats in favour of their alternates. The Court rejected the petition based on a formalistic reading of article 161 of the Constitution and article 54 of the Court Act. These two cases in which the Court took a step back against the admissibility of political rights cases are compounded by a series of three other cases where the Court decided to uphold the *status quo ante*.

2.1.3 Upholding the status quo *in the interpretation of admissibility requirements*

Three cases illustrate perfectly how the Court prefers to uphold the *status quo* rather than advance constitutionalism and human rights ideals through litigation: Judgment R.Const. 0007 of 29 January 2016,[25] Judgment R.Const. 155 of 29 April 2016[26] and Judgment R.Const. 0003bis of 12 December 2015.

In Judgment R.Const. 0007 of 29 January 2016, Mbata Betukumeso approached the Constitutional Court for a declaration of constitutional invalidity of 16 provisions of the Criminal Code, seven provisions of the Criminal Military Code, and any other legal provisions pertaining to the death penalty in the DRC.[27] The petitioner argued that death penalty provisions in these legislation should be declared unconstitutional so as to align them with the 'spirit' of the Constitution and international human rights treaties.[28]

Deciding to take a literal reading of article 50(1) of the Court Act, the Court declared this petition inadmissible. It observed that the first impugned legislation, the Criminal Code, entered into force on 30 January 1940, while the second, the Criminal Military Code, entered into force on 18 November 2002.[29] According to the Court's reasoning, the petitioner was wrong to directly challenge this legislation 75 and 13 years respectively after they entered into force.[30]

25 Decided on 29 January 2016.
26 Decided on 29 April 2016.
27 Judgment R.Const. 0007 (n 3).
28 See Judgment R.Const. 0007 (n 3).
29 Judgment R.Const. 0007 (n 3).
30 Judgment R.Const. 0007 (n 3). The Court 'notes that the date when the complaint was lodged, 20 April 2015, violates art 50(1) of the Court Act which makes it a prerequisite for an action brought "directly" by an individual to be declared admissible, namely, the obligation to lodge such an application within six months of the publication of the act in the Official Gazette or following the date of its implementation'.

The Court followed similar reasoning in Judgment R.Const. 155 of 29 April 2016. In this case, Mr Maleka challenged disciplinary decisions of the National Bar Association alleging that the 1979 Bar Act violates international human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR) by empowering the Disciplinary Body of the Bar to adopt decisions at the first and last instance. In addition to the violation of his right to be tried before his natural judge and the right to defence and legal remedy, the petitioner invoked the violation of article 14(5) of the ICCPR on the right to appeal in criminal matters.[31] Without considering the legal significance of allegations invoked by the petitioner, the Court rejected the application because by the time the petitioner approached it, the Bar Act had already been in force for more than six months, as required under article 50(1) of the Court Act.[32] The Court's position has remained unchanged.[33]

The subject matter and the position of the Court in relation to the admissibility of the petition in Judgment R.Const. 0003bis of 12 December 2015 differ substantially from the two previous cases, albeit that all the three cases lead to similar outcomes. In this case, Mr Nicolas-Daniel Lenga and 10 other applicants challenged the constitutionality of the 2015 Electoral Calendar since it could amount to excluding more than nine million young voters between the age of 18 and 22 from participating in elections.[34] The Court declared the petition inadmissible since the petitioners were not directly affected by the decision of the Electoral Commission and did not demonstrate they were mandated by young people between the age of 18 and 22 to act on their behalf.

2.2 Use of teleological and extra-legal arguments to expand the Court's substantive jurisdiction

In the cases summarised in section 2.1.1 the Court vigorously uses the teleological interpretation to expand rules of standing and decide on acts of legislative assemblies that are alleged to impugn on the rights to defence and legal remedy. However, by invoking teleological rather than textual arguments in these cases, it is doubtful that the Court was guided

31 Judgment R.Const. 0007 (n 3) 9.
32 Judgment R.Const. 155 (n 2).
33 Judgment R.Const. 1156 of 27 April 2023.
34 Judgment R.Const. 0003bis (n 3) reported in 3 *Annuaire congolais de justice constitutionnelle* (2018) 343.

merely by the need to protect the rule of law, democracy and the right of individuals as it claimed. The discussion in sections 2.1.2 and 2.1.3 shows how the Court takes a different approach even when human rights are at stake.

There are two reasons that could explain the Court's differing approaches. Firstly, the constitutional status of a right that has allegedly been infringed plays an important role in interpretation. The Court's reasoning suggests that the rights to defence and the rights to legal remedy are important because they are rights which 'cannot be derogated upon (…) even in instances when a state of siege or state of emergency have been declared'.[35] In fact, article 61(5) conceives of 'the right to defence and the right to a remedy' as being so fundamental that it cannot be subjected to frivolous infringement, especially under exceptional circumstances where the temptation to use exigencies as grounds to impugn rights is greater than usual.[36]

However, the reliance on the special constitutional status of a right as a condition for the Court's jurisdiction appears selective. In a case involving a direct constitutional petition challenging a decision of the Tribunal of Commerce for allegedly violating the right to property guaranteed under article 34 of the Constitution, the Court affirmed its jurisdiction, notwithstanding the fact that the right to property is not among the rights explicitly accorded special or non-derogable status under the Constitution.[37]

Be that as it may, the importance of due-process guarantees also stems from the nature of judicial remedies against decisions adopted by legislative assemblies. The petitions brought before the Constitutional Court were challenging political acts – the vote of no-confidence and resolutions – taken by legislative bodies in the exercise of their constitutional powers to control executive officials.[38] The vote of no-confidence is not justiciable either before the Court of Cassation, the Council of State or any other national court[39] save the Constitutional

35 Judgment R.Const. 469 (n 3).
36 CM Fombad & LA Abdulrauf 'Comparative overview of the constitutional framework for controlling the exercise of emergency powers in Africa' (2020) 20 *African Human Rights Law Journal* 407-408.
37 Judgment R.Const. 1879 of 20 December 2022.
38 J-LE Kangashe *Traité de droit constitutionnel congolais* (2017) 223-232.
39 In Judgment R.Const. 051/TSR of 31 July 2007, the *Trésor Kapuku* case, the petitioner's application was rejected by the Court of Appeal on admissibility grounds.

Court.[40] The Court thus declares it has jurisdiction over these petitions because there is no other competent court that can decide on them.[41]

Otherwise, the Court could end up denying justice to those facing decisions of political organs. In 1996, the Supreme Court of Justice Administrative Section, in a politically controversial petition, declared that it lacked jurisdiction to examine the legality of legislative acts, thereby depriving petitioners of the rights to legal remedy. It ruled that such competence was bestowed on the Constitutional Court.[42] The Court may have been conscious of this historical event.

Secondly, most governors and presidents of provincial assemblies who were victims of votes of no-confidence were members of the ruling coalition at the time the Court made its decision.[43] The Court might have thought that its decisions would gain political legitimacy if they upheld the interests of the regime in place rather than contradicting them. Epstein and others observed that courts in their infancy tend to be deferential to the policy preferences of powerful actors, especially when they have yet to 'build up reservoirs of public and political support from which to draw when confronted with threats'.[44] They suggest that a court which is convinced that its decisions would be supported by the ruling power might follow a policy choice that furthers the latter's interest to avoid confrontation, even when this would entail adjudication in contradiction with substantive and procedural rules.[45] Recent judgments

40 E-PF Molima Mwata 'Cour constitutionnelle de la République démocratique du Congo' *Actes du 8e congrès triennal de l'ACCF: La sécurité juridique* (2019) 538-539. In Judgment R.Const. 168 (n 3) adopted following a petition lodged by Katako Babandoa Arnold and others, the Constitutional Court rejected the application on the basis, among others, that the impugned Act, a Presidential Ordinance, was neither legislation nor a regulation but an administrative act falling under the jurisdiction of the Council of State. In this case, one can see that there was a court which was competent to adjudicate such matters. According to the Court, the petition was outside its jurisdiction because the Act did not contain 'provisions of general application, abstract and impersonal' or 'rules of conduct applicable to all'. Under Congolese Administrative Law, such acts are known as Administrative Individual Acts.

41 Judgment R. Const. 1272 (n 3).

42 Judgment of 21 August 1996 *USOR and Alliés* (Supreme Court of Justice, Administrative Section).

43 See also, Judgment R.Const. 1703 of 8 February 2022.

44 L Epstein, J Knight & O Shvetsova 'The Role of constitutional courts in the establishment and maintenance of democratic systems of government papers of general interest' (2001) *Law and Society Review* 127.

45 As above. As an exception, one notes that the Constitutional Court rejected the application by Pierre Masudi Mendes, ousted vice-governor, on the grounds that it lacked jurisdiction although the petitioner was a member of the ruling coalition.

of the Constitutional Court concerning the constitutional review of emergency measures,[46] the state of siege,[47] the prosecution of a former Prime Minister currently serving as an opposition leader,[48] and the oversight of electoral regularity[49] suggest a marked judicial deference to the executive branch.

Nevertheless, the Court's expansive interpretive approach in human rights cases has been the subject of criticism in the legal profession and academia.[50] Some are of the view that its jurisdiction is explicitly provided for by the law.[51] By invoking teleological arguments when it lacks jurisdiction, the Court acts *ultra vires*.[52] These teleological arguments would be justified only if the Constitution and the Court Act are amended to include the vote of no-confidence or to confer on the Court general jurisdiction on human rights violations.[53] This is in line with the rule of law and the principle of legality, which require the process of making the law to be 'transparent, accountable and democratic'.[54] Other scholars argue that the need to protect fundamental rights and freedoms, and the constitutional order in general, must prompt the Court to examine the merits of cases even when, manifestly, it lacks substantive jurisdiction over certain acts.[55] Epotu, who takes this approach, argues that the Court must decide on merits in particular when the protection of human rights is at stake.

46 Judgment R.Const. 1200 of 13 April 2020.
47 Judgment R.Const. 1550 of 6 May 2021.
48 Judgment R.Const. 1816 of 18 November 2022.
49 Jugdment R.Const. 2120 of 14 December 2023.
50 Wetsh'Okonda Koso Senga (n 2) 97-98; A Mampuya 'Non, Messieurs: une motion de défiance n'est pas un acte législatif (Pot)' *Congoforum.be*, 30 November 1AD https://www.congoforum.be/fr/2007/11/20-11-07-non-messieurs-une-motion-de-dfiance-nest-pas-un-acte-lgislatif-pot/ (accessed 23 January 2020); M Wetsh'Okonda Koso Senga 'Les méthodes d'interprétation de la Constitution par la Cour constitutionnelle congolaise: Progrès, récul ou stagnation?' *Mélange en honneur du Doyen Raphael Nyabirungu Mwene Songa* (2021) Forthcoming.
51 B Kahombo 'Les modalités d'exercice du recours individuel en inconstitutionnalité en droit positif congolais entre ambiguïté et nécessité de réforme juridiques' (2017) 20 *Recht in Africa - Law in Africa - Droit en Afrique* 134.
52 As above.
53 As is, for instance, the case with Benin.
54 CM Fombad 'An overview of the crisis of the rule of law in Africa' (2018) 18 *African Human Rights Law Journal* 217.
55 See generally Epotu (n 4) RT Thamba 'Banyaku Luape Epotu, quelques questionnements sur la procedure devant la cour constitutionnelle: Esquive judiciaire ou délicatesse politique face aux besoins de justice des citoyens congolais. La vision d'un politologue, Kinshasa, Editions CEDIS, 2017' (2018) 3 *Annuaire congolais de justice constitutionnelle*.

A number of petitions have subsequently been rejected on jurisdictional grounds, with the Court – contrary to its progressive approach in invoking teleological arguments in some cases – invoking textual arguments and rejecting those petitions. I examine these cases in the next section.

2.3 Use of textual and formalistic arguments to restrict access to the Court

The Court furthermore used textual or formalistic methods to reject petitions challenging the constitutionality of legislation that entered into force more than six months after the petition was filed. Some observations on the approach adopted by the Court in Judgment R.Const. 0007 of 29 January 2016 and Judgment R.Const. 155 of 29 April 2016 are worth being made.[56]

One is left with the impression that the Court resorted to a logically fallacious reasoning[57] in these two cases by applying the six-months rule to legislation enacted during the colonial era or before the advent of the 2006 Constitution.[58] Apart from the fact that constitutional review was not provided for at the time these laws were enacted (1940, 1979 and 2002 respectively), the logical consequence of constitutionalism would have prompted the Court to ensure that infra-constitutional norms remain consistent with the Constitution whether they were adopted before or after the Constitution.[59] In general, some scholars note that much legislation between 1967 and 2006 were adopted by 'less representative legislatures'[60] in an environment where the executive

56 See also Judgment R.Const. 2002 of 14 December 2023 in Cour constitutionnelle *Bulletin des arrêts: Contentieux de constitutionnalité 2022-2023* (2024) 390-391.

57 AJ McClurg 'Logical fallacies and the Supreme Court: A critical analysis of justice Rehnquist's decisions in criminal procedure cases' (2010) SSRN Scholarly Paper ID 1633960 742-746 https://papers.ssrn.com/abstract=1633960 (accessed 28 October 2019).

58 Kahombo (n 51) 145.

59 Art 221 of the Constitution is clear: 'provided that they are not contrary to this Constitution, the legislative and regulatory texts in force remain valid until their abolition or modification'.

60 Members of Parliament were handpicked by the executive and could rarely be seen as representing the people. Further, the President of the Republic had the power, according to art 41 of the 24 June 1967 Constitution as amended, to enact legislation, called 'Ordinance-Laws', during parliamentary recess. Instead of resorting to this mechanism exceptionally, it became the main way in which

controlled the legislature.[61] In addition, a human rights culture had not permeated institutions during those days. Wetsh'Okonda Koso Senga suggests that many laws were adopted not because of their consistency with the Constitution but because they received the support of the majority in Parliament.[62]

The Court should have been cognisant of this historical background. Rather, it assumed that only legislation enacted after the 2006 Constitution could be challenged and that it must be done so within six months. It also assumed that law-makers intended to preserve legal stability by excluding legislation adopted before the advent of the Constitution from constitutional review until the legislature decides to amend it through the regular legislative process.[63] The legislative process is highly political in nature and beyond the reach of ordinary citizens who endure the day-to-day violation of their rights through legislation that pre-dates the Constitution.

Speaking from the context of the United Kingdom, the Formerly Lord Chief Justice of England, Wales and Northern Ireland, Harry Woolf, lamented that 'sometimes Parliament is not prepared to do the job for us and then we, as judges, have to do our best in the culture in which we work to fill the gaps that are left'[64] in instances when controversial issues are left to them (judges) to regulate. This pragmatic stance which considers the *realpolitik* of a society seems to be advisable for courts willing to defend the human rights culture through adjudication rather than hiding behind formalistic assumptions.

Judgment R.Const. 0007 of 29 January 2016 and Judgment R.Const. 155 of 29 April 2016 showed that, whatever the assumptions of the Court might have been in rejecting these two cases, the Court got it wrong. Article 221 of the Constitution stipulates that '[p]rovided that they are not contrary to this Constitution, the legislative and regulatory texts in force remain valid until their abolition or modification'. This is

laws were promulgated in the Mobutu era. It is thus difficult, sociologically and in practice, to suggest that these laws reflected the 'general will of the people'.

61 Wetsh'Okonda Koso Senga (n 2) 83-84.

62 Wetsh'Okonda Koso Senga (n 2) 85.

63 Wetsh'Okonda Koso Senga (n 2) 97 (arguing that drafters of the Constitution, by the mere fact that they protected fundamental rights when they are violated by legislation and regulation, and not by any other means, wilfully accepted that some violations of human rights would not be adjudicated by the Constitutional Court).

64 H Woolf 'Preface' in Albie Sachs *The strange alchemy of life and law* (2011) x.

an indication that drafters of the Constitution, as rational actors, did not intend to permit laws that violate fundamental rights to remain in force.[65] The Court overlooked the possibility that its jurisdiction could be extended to laws that are outside the six-months parameter and which, if kept in force, would continue to violate the human rights the judiciary is supposed to protect.[66] Two explanations about why teleological arguments were eschewed by the Court, especially in Judgment R.Const. 0007 of 29 January 2016, may be suggested.

The Court applied canons of constitutional avoidance by selecting the 'least constitutionally problematic'[67] interpretation because it perhaps believed the matter could be settled on a non-constitutional basis. Five years before the petition was filed (on 25 November 2010), the National Assembly rejected a bill on the abolition of the death penalty.[68] The Court thus avoided serving as a *de facto* third chamber of parliament.[69] When constitutional courts face indeterminate issues in which various solutions and interpretive approaches are conceivable,[70] they frequently adopt an approach that enables them to avoid delving into politically sensitive issues. The reason overtly declared by the Court was that the legislation was not challenged in time, whereas its covert reason seems to be that this was a political question it was appropriate for Parliament

65 On the assumption of rationality, see generally A Jakab 'Constitutional reasoning: A European perspective on judicial reasoning in constitutional courts' (2013) 14(8) *German Law Journal* 1249. For a similar reasoning, see Judgment DCC 13-082 of 9 August 2013 (Benin Constitutional Court) 5.

66 Art 154(3) of the 2006 DRC Constitution.

67 See for instance A Vitarelli 'Constitutional avoidance step zero comment' (2009) 119 *Yale Law Journal* 838.

68 See generally AMB Mangu *Abolition de la peine de mort et constitutionnalisme en Afrique* (2011); AMB Mangu 'The Constitutional Court and the promotion of constitutionalism in South Africa: Two decades on' in O Narey (ed) *La justice constitutionnelle: Actes du colloque international de l'ANDC* (2016) 186.

69 A Stone *The birth of judicial politics in France: The Constitutional Council in comparative perspective* (1992) 210. In 2010, the petitioner proposed to the National Assembly that the issue of the abolition of the death penalty should be submitted before the Constitutional Court for determination. The National Assembly Speaker did not yield to his demand since the process, he said, was purely legislative and the Court had at that stage no role to play. In Judgment R.Const. 624/630/631 (n 3), the Court applied constitutional avoidance canon by rejecting the petition submitted by members of parliaments on the account that, having failed their initiatives, they could not have approached the Court based on art 162(2) of the Constitution (individual powers to challenge unconstitutional norms). This provision was not meant to confer collective rights to individuals.

70 A Klaasen 'Constitutional interpretation in the so-called "hard cases": Revisiting *S v Makwanyane*' (2017) 50 *De Jure* 1-3.

to decide. Furthermore, article 49 of the Court Act enables the Court-based Prosecutor General to automatically appeal before it against laws that violate human rights.[71] In rejecting petitions in Judgment R.Const. 0007 of 29 January 2016 and Judgment R.Const. 155 of 29 April 2016, the Court might have assumed that the petitioner could still approach the Prosecutor General, who could lodge a complaint in the *interest of the public*. This assumption is not supported by facts as I demonstrate below.

2.4 Interpretation of actions in the interest of the public

In Judgment R.Const. 0003bis of 12 December 2015, the Court rejected the petition because the petitioners did not prove they were acting on behalf of young voters.[72] In this case, petitioners challenged the decision of the National Independent Electoral Commission to go ahead with the preparation and organisation of election without registering over 9 million voters between the age of 18 and 22.[73] The failure to register this category of voters was considered a violation of their civil and political rights and therefore should not be condoned by the Constitutional Court.[74] The Court rejected the petition on the basis that, 'a petition based on the mere interest of any citizen to have the law respected is not allowed'.[75] The legalistic argument adopted by the Court may have been predicated on the assumption that the Prosecutor General, not individuals, is entitled to petition the Court in the interest of public.[76]

However, this assumption can be misleading. The Court's approach assumes that the Prosecutor General could be sensitive to human rights violations and could challenge behaviour of the state and its organs that violate human rights. An examination of the registry of the Court's constitutional review petitions between May 2015 and August 2019 and the 2024 Court Law Report indicates that the Prosecutor General had not attempted[77] to challenge laws violating fundamental rights and

71 See generally G-PDB Lokema 'Parquet Général près la Cour constitutionnelle de la République Démocratique du Congo' (2016) 1 *Annuaire congolais de justice constitutionnelle* 103-104.
72 Judgment R.Const. 0003bis (n 34) 351.
73 As above, 343.
74 As above, 343-344.
75 As above.
76 Epotu (n 4) 60.
77 This power is defined under art 49 of the Court Act.

freedoms since the inception of the Court.[78] This is unsurprising. Prior to the advent of the Constitutional Court, the Prosecutor General was empowered to challenge unconstitutional laws before the constitutional section of the Supreme Court of Justice but never did so, despite the fact that the office was approached by political activists, for instance in 1991 and 1999, to challenge legislation before the Court on their behalf.[79] As Prosecutor Generals are appointed, promoted and controlled by executive officials, the interests of the states may seem to come before individuals' rights. The dependence of the Prosecutor General on the executive hampers its ability to fulfil its human rights protection mandate.[80] Adjolohoun and Fombad regard the situation as a threat 'to the good administration of justice but also the entrenchment of a culture of constitutional democracy'.[81]

Rejecting individual petitions based on the absence of interest is legally valid. However, the Court has not been consistent in this regard: it applies double standards. To trump admissibility rigidity, it invoked the 'protection of rights and fundamental constitutional principles'[82] or its powers as a guarantor of human rights in other cases.[83] One of these cases is Judgment R.Const. 212/216/2016. In this case, the petitioner, Advocate Kabengele Ilunga challenged the constitutional validity of Organic Act 15/014 of 1 August 2015 Modifying and Complementing Organic Act 06/020 of 10 October 2006 on the Status of Judges given that it suppresses the right to defence of judges who face a removal

78 Registry of the Constitutional Court 'Registre des arrêts prononcés par la Cour Constitutionnelle de la République Démocratique du Congo en matière de controle de constitutionnalité entre le 29 mai 2015 et 27 août 2019'. On the Office of the Constitutional Court-based Prosecutor General, see Lokema (n 71) 89-100.

79 J-LE Kangashe *La Constitution congolaise du 18 février 2006 à l'épreuve du constitutionnalisme* (2010) 230.

80 Lokema (n 71) 103-104; CS Minga & GB Ekomene 'La deuxième composition du Parquet Général près la Cour constitutionnelle: Renouvellement de mandat et nouvelles nominations' (2018) 3 *Annuaire congolais de justice constitutionnelle* 50-54.

81 H Adjolohoun & CM Fombad 'Separation of powers and the position of the Prosecutor General in Francophone Africa' in CM Fombad (ed) *Separation of powers in African constitutionalism* 366-376.

82 JK Mpiana 'L'irrécevabilité d'une requête pour défaut d'intérêt personnel devant la Cour Constitutionnelle dans l'arrêt "Decision CENI du 12 février 2015": Une échappatoire de la Cour?' (2018) 3 *Annuaire congolais de justice constitutionnelle* 362.

83 Judgment R.Const. 212/216/2016 (n 3).

procedure and their right to legal remedy, among others.[84] However, the petitioner did not demonstrate his interest, that is, the way his situation could be affected by the unconstitutionality of the law.[85] Unlike its legalistic approach in Judgment R.Const. 0003bis of 12 December 2015, the Court was generous towards Advocate Ilunga Kabengele without explaining why. A rigid application of the requirement of 'interest' deprives individuals of a legal remedy when they seek to protect the rights of others who cannot approach the Court.[86]

3 The interpretation of substantive rights

In the previous section, I dealt with the way the Court interprets its substantive jurisdiction and admissibility requirements; in this section, I look at the interpretation of substantive rights. The examination focuses on the rights to equality and non-discrimination (3.1), political rights (3.2), and the rights to fair trial and due process of law (3.3).

3.1 The rights to equality and non-discrimination

In a handful of cases, the Court determined the content of the rights to equality and non-discrimination provided for under articles 11, 12 and 13 of the Constitution.[87] This section looks at the scope of the rights under the Constitution, the methods of interpretation the Court applied, and the way the nature and the scope of the rights were interpreted by the Court.

3.1.1 Constitutional protection of the rights to equality and non-discrimination

Three types of equality rights are provided for under the Constitution: equality in dignity and rights, equality before the law, and equal

84 Judgment R.Const. 212/216/2016 (n 3).
85 Mpiana (n 82) 362.
86 The African Court on Human and Peoples' Rights in *Konate v Burkina Faso* ruled that allowing only a few institutions to approach the constitutional jurisdiction was not an effective and sufficient remedy. See *Lohé Issa Konaté v Burkina Faso* (merits) (2014) 1 AfCLR 330, para 112.
87 Although these rights are guaranteed by different provisions under the Constitution, the fact that they often go hand in hand with each prompted this chapter to consider them together. This, however, does not deny the fact that they are conceptually and substantively different.

protection by the law. The Constitution does not define their meaning and content. The Electoral Law bifurcates the enjoyment of 'equality in rights' in that voting rights are accrued to 'Congolese' unless exceptions have been made under the law.[88]

Equality goes hand in glove with non-discrimination.[89] Article 13 prohibits discrimination on the following grounds: 'religion, family origin, social condition, residence, views or political convictions, or membership of a certain race, ethnicity, tribe, cultural or linguistic minority'. The provision omits 'sex', which was a ground for discrimination under the Interim Constitution.[90] This may be attributed to the fact that articles 14 and 15 afford special protection to women who, within the Congolese setting, are generally victims of discrimination based on 'sex', as well as to the fact that these grounds are merely indicative and not exhaustive. The wording of article 13 seems to suggest that foreign nationals may be 'discriminated' in relation to access to education and public office because it provides that '[n]o Congolese person may, in matters of education or access to public functions or any other matter, be subject to any discriminatory measure'.

There is no limitation or derogation allowed on the prohibition of discrimination: legislation, executive actions or other measures that institute discrimination are unconstitutional. The rights to equality and non-discrimination are *erga omnes* rights and obligations because they are enforceable against anybody, and both state and non-state organs are obligated by them. They constitute important safeguards for the enjoyment of other rights.

3.1.2 Overview of cases under discussion

The Court has dealt with a few cases related to the right to equality and non-discrimination. A substantive analysis of them reveals two contrasting outcomes. Whilst the two cases, summarised below, show how the Court upheld legislation that did not further the participation of minority groups – namely women and independent candidates – and

88 Art 5 of the General Electoral Law (2006/2017).
89 Under the 2003 Interim Constitution, both rights are provided for under art 17.
90 Art 17(2) of the 2003 Interim Constitution in M Wetsh'Okonda Koso Senga *Les textes constitutionnels congolais annotés* (2012)373.

all the citizens living abroad in the political process, the second type of case enhanced economic equality.

Upholding legislation undermining the participation of minority groups and the diaspora

The landmark equality case decided by the Constitutional Court is Judgment R.Const. 624/630/631 of 30 March 2018.[91] This is a joinder of three separate applications that all challenged the constitutional validity of the 2017 amendment to the 2006 Electoral Act. In 2017, the National Assembly passed an amendment to the Electoral Law which, among other things, instituted a legal election threshold, that is, it specified a percentage of the vote each political party or group of political parties should obtain before it can be considered in the calculation of seats.[92] Furthermore, article 13 of the Electoral Law was passed to promote the participation of women in national legislative elections; however, article 13(2) does little to impose a duty on political parties to seek and obtain women candidates. The provision suggests that presenting female candidates is desirable but not an obligation.

Before the Court, the petitioners argued that the 2017 amendment sought to eliminate independent candidates from running by imposing the obligation to reach the one (1) per cent legal election threshold, notwithstanding that the Constitution prohibits any discriminations whatsoever.[93] In response, the Court argued that nothing in the amendment suggested that some Congolese were explicitly banned from running.[94] The petitioners further argued that the amendment violated articles 12 and 13 of the Constitution because the institution of a national threshold indirectly prevents political parties and independent

91 See also Judgment R.Const. 1826 of 29 December 2022.

92 SL Mbaya 'Actualité sur les règles de jeu électoral en République démocratique du Congo: Que savoir de la loi électorale révisée du 24 décembre 2017?' (2019) 2(1) *Revue congolaise d'analyse des politiques et pratiques électorales* 61.

93 Judgment R.Const. 624/630/631 of 30 March 2018 reported in 3 *Annuaire congolais de justice constitutionnelle* 416.

94 As above. Historically, citizens who were not members of Mobutu's Popular Movement for the Revolution (MPR) were explicitly banned from running for office. Elected MPs who resigned from the MPR were also excluded from parliament since their position was linked to their membership of the MPR, which was empowered to shortlist candidates. In 1970 and 1975, MPs were elected through acclamation during MPR rallies since the electoral law allowed this mode of election. See Wetsh'Okonda Koso Senga (n 2) 81-82.

candidates who are not known in all the parts of the country from obtaining one (1) per cent nationwide and winning the elections.

The Court ruled that the right to equality does not prevent the law-maker from 'regulating different situations differently' or from derogating from the 'principle' of equality to attain general interest 'provided that in one case or another, the different treatment stemming therefrom be related to the object of the law which establishes it'.[95] This object is the rationalisation of the electoral system.

Another petitioner challenged article 13 of the Electoral Law because it failed to impose on political parties the obligation to respect gender parity by submitting lists of legislative candidates with the same number of male and female candidates, thus contradicting article 14 of the Constitution.[96] The Court rejected this reading, arguing that the intent of the drafters of the Constitution under article 14 is not to ensure equal representation of female and male candidates on party lists.[97] The Court ruled that since article 13 of the Electoral Law urges political parties to have female candidates, it promotes 'equitable representation' of women in the electoral process. The Court explained the meaning of article 13(2) of the electoral law:

> [G]ender equality cannot be conceived of either in arithmetic terms or as a mathematical equation, with regard to equal opportunities between men and women, and secondly that commitment to political parties are free so that the number of women and men actually engaged in the life of political parties is likely to vary from one political party to another and could not be foreseen in advance to render inadmissible lists which would not provide a determined number of seats for women.[98]

95 As above.

96 Art 14 reads: '1. The public authorities see to the elimination of all forms of discrimination against women and ensure the protection and promotion of their rights; 2. They take in all areas, and most notably in the civil, political, economic, social and cultural areas, all appropriate measures in order to ensure the full realization of the potential of women and their full participation in the development of the nation; 3. They take measures in order to fight all forms of violence against women in their public and private life; 4. Women are entitled to equitable representation in national, provincial and local institutions; 5. The State guarantees the achievement of parity between men and women in said institutions.'

97 Judgment R.Const. 624/630/631 (n 3).

98 Judgment R.Const. 624/630/631 (n 3). Author's translation. The original reads: *'La Cour considère que l'incise de l'art 13 visé au moyen trouve son explication non point dans une volonté de compromettre le principe de la promotion de la femme proclamé par le constituant, mais uniquement, d'une part dans le fait que l'égalité genre ne peut se concevoir ni en des termes arithmétiques, ni en une équation*

In Judgment R.Const. 1879 of 20 December 2022, the Court reaffirmed its position, ruling that the Electoral Commission did not violate the right to equality by excluding Congolese residing outside the five pilot countries from voting abroad, due to the technical impossibility of conducting elections in those locations, a situation deemed a case of *force majeure*, and the urgent need to promptly organise presidential elections to ensure the renewal of leadership within the five-year presidential term limit.

Fostering economic equality

The Judgment R.Const. 113/TSR of 26 March 2010 is different from Judgment R.Const. 624/630/631 of 30 March 2018 not just because it was delivered eight years prior to the latter, but also because of the difference in subject matter. George Arthur Forrest challenged the Congolese Central Bank (BCC) decision to prevent his company and family from the redemption of shares in the Congolese Commercial Bank because they were not 'bankers' and lacked 'international' ranking.[99] The petitioners recognised that the condition established by the BCC was noble. However, it was not imposed on other banks, including a newly established Congolese bank. In this case, the Court ruled that the BCC decision established inequality among commercial institutions operating in the DRC. The Court read the right to equality in conjunction with the right to freedom of association, mainly because the petitioners used the latter to augment their argument that the Bank violated their right to equality.

mathématique, s'agissant d'une égalité de chances entre l'homme et la femme, et d'autre part par le fait que l'engagement dans les partis politiques est libre, en sorte que le nombre de femmes et d'hommes effectivement engagés dans la vie des partis politiques est susceptible de variation d'un parti politique à un autre et ne peut être maitrisé en amont pour justifier l'irrecevabilité de toutes listes qui n'auraient pas prévu un nombre déterminé de sièges aux femmes.'

99 Judgment R.Const. 113/TSR of 26 March 2010 reported in EM Wafwana and others *Jurisprudence. Cour suprême de justice. Contentieux constitutionnel et législatif* (2011) 70.

3.1.3 Choice and application of methods of constitutional interpretation

The examination of the three equality cases shows that the Court's understanding of equality is formalist and not substantive. Unlike the South African Constitution, the DRC Constitution, like the Benin Constitution, does not contain an explicit obligation to seek and advance substantive equality.[100] However, the concepts of 'equality' and 'non-discrimination' are loaded with moral values that cannot be surfaced through a literal reading of constitutional provisions alone. Formal equality 'dictates behaviour through applying rules and procedures consistently', in contrast with substantive equality or equality of outcomes, which aims to 'invest a certain moral principle (namely social redistribution) into the application of equality'.[101] The redistribution concerns wealth, power and status, while 'formal equality' is deontological, 'substantive equality is 'consequentialist'.[102] As Albertyn and Goldblatt note,

> Formal equality also entails a formal approach to law (legal formalism) in which issues are narrowly defined and abstracted from social life. The actual social and economic differences between individuals and groups are not seen to be essential to the legal enquiry. Formal equality is perhaps best described as the abstract prescription of equal treatment for all persons, regardless of their actual circumstances.[103]

Substantive equality can be obtained by construing positive discriminatory measures or affirmative actions as part of constitutional obligations.[104] In the absence of an explicit constitutional provision, it is difficult to predict whether the Constitutional Court will resort to this approach anytime soon. The wording and the interpretation of the right to equality nonetheless reveal the formalistic tendencies of the DRC's constitutional tradition.[105]

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100 See sec 9 of the 1996 South African Constitution.
101 'The idea of equality and non-discrimination: Formal and substantive equality' https://www.equalrightstrust.org/ertdocumentbank/The%20Ideas%20of%20Equality%20and%20Non-discrimination,%20Formal%20and%20Substantive%20Equality.pdf (accessed 12 November 2019).
102 C Albertyn & B Goldblatt 'Equality' in S Woolman & M Bishop (eds) *Constitutional law of South Africa* (2013) 35-6.
103 As above.
104 As above.
105 Wetsh'Okonda Koso Senga (n 90).

3.1.4 Implications for the right to equality and non-discrimination

In the three equality cases, the Court devised a test based on which one can examine possible violations of the right to equality. Just as in Benin, the Court takes the approach of 'treating likes alike', which aligns with the wording of the equality clause in the Constitution. This test, borrowed from the French Constitutional Council,[106] has its inherent problems, however.[107]

Scholars such as Fredman criticise the application of the 'treating likes alike' test based on problems it generates, notably the issue of threshold, because it is difficult to demonstrate 'when two individuals are relatively alike'.[108] Another problem is the constant need to find a 'comparator' under the assumption that 'there exist a universal individual' with whom to compare.[109]

In the case of the DRC, one lesson of the application of the 'treating likes alike' test is that when discrimination and inequality are not substantive – a situation difficult to decipher without examining the historical and material conditions of individuals involved – the application of the test leads to an outcome that upholds equality. Judgment R.Const. 113/TSR of 26 March 2010 epitomises the successful application of the formal equality test. Conversely, when the inequality is a result of embedded cultural, religious and political practices that span decades in a society, such as the inequality women continue to suffer in regard to political inclusion,[110] applying the 'treating likes alike' test, as in Judgment

106 T Debard *Dictionnaire de droit constitutionnel* (2007) 166.
107 S Fredman *Discrimination Law* (2011) 8-9.
108 Fredman (n 107) 8-9.
109 Fredman (n 107) 11.
110 F Mugombozi 'La participation de la femme congolaise dans la vie publique 60 ans après l'accession de la RDC à l'indépendance' in JB Akilimali & TM Makunya (eds) *L'Etat africain et la crise postcoloniale: Repenser 60 ans d'alternance institutionnelle et idéologique sans alternative socioéconomique* (2021) 307; V-A Touché 'La situation des femmes en République démocratique du Congo' in Konrad Adenauer Stiftung (ed) *Femmes et engagement politique en République démocratique du Congo* (2014) 15-22; CN wa Mbombo 'Le rôle de la femme politique en République démocratique du Congo' in Konrad Adenauer Stiftung (ed) *Femmes et engagement politique en République démocratique du Congo* (2014) 67-80; M-JT Lusamba 'Défis de la participation des femmes à la vie politique' in Konrad Adenauer Stiftung (ed) *Femmes et engagement politique en République démocratique du Congo* (2014) 87-96; DN Kota 'Regard critique sur la participation des femmes à la vie politique en République démocratique

R.Const. 624/630/631 of 30 March 2018, does not solve the actual problem.[111]

3.2 The rights to a fair trial and due process of law

The right to a fair trial and due process of law undeniably enables the Court to flex its human rights protection muscles. It allows individual political officials who are excluded from their positions to approach the Court and air their grievances. This has occasioned some innovation in the Court's interpretive approaches.[112] The Court rendered the adjudication of political questions and controversies possible by ensuring that all arms of governments, national and provincial, respect the Bill of Rights.[113]

In this section, I examine the scope of the rights to fair trial and due process of law under the Constitution, provide an overview of cases relating to due process guarantees, discuss the interpretations thereof by the Court, and consider their implications.

3.2.1 Constitutional protection of rights to fair trial and due process of law

Five aspects of fair trial and due process of law rights are covered under articles 17, 18, 19, 20, 21, 61(4) and 61(5) of the 2006 Constitution: the constitutionality of criminal prosecutions, procedures and punishments; the rights of detained and arrested individuals during the pre-trial stage; the conduct of trials and guarantees of fair hearings; the substantive requirements of judicial decision-making; and prohibition of derogations.

Of particular importance is article 19, which covers components of the right to defence and legal remedy. The provision reads:

> (1) No person may be removed or transferred against his will from the judge who has been assigned to hear his/her case.
> (2) All persons have the right to have their case heard by a competent judge within a reasonable time.

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du Congo' in Konrad Adenauer Stiftung (ed) *Femmes et engagement politique en République démocratique du Congo* (2014) 97-112.

111 See generally JP Langa 'Transformative constitutionalism' (2006) 17 *Stellenbosch Law Review* 357.

112 Kalubi (n 4).

113 Kos'Ongenyi (n 5) 213-218; Mvumbi-di-Ngoma (n 1).

(3) The right to defence is organized and guaranteed.
(4) All persons have the right to defend themselves or to be assisted by counsel of their choice at all stages of the criminal procedure, including the police investigation and the pre-trial enquiry.
(5) They may also be assisted [by counsel] before the security forces.

As the wording of most aspects of this provision is formalistic, it becomes clear that the Constitutional Court will play a significant role in delineating clearly its normative content and the obligation it imposes on various arms of government.

Significantly, the extent to which political organs, such as legislative assemblies empowered to control executive officials, are obliged to hear individuals facing an adverse decision before proceedings against them can be initiated has had to be clarified.[114] The unpreparedness of legislative assemblies to respect the right to be heard could be seen in Judgment R.Const. 062 of 26 December 2007, where the Sud-Kivu Provincial Assembly argued that it was not obligated to hear a provincial governor before it took a vote of no-confidence against them.[115] In regard to a purely political process and one which is not a trial, the major question remained how the right to defence applies to deliberative assemblies, especially because article 19(4) of the Constitution is explicit with regard the right to defence and representation in 'criminal procedure'.

Structurally, the right to defence and legal remedy is one of the few rights to be made non-derogable even in instances when states of emergency or siege are declared.[116] Understanding the relationship between this provision and article 19 and the Constitution as a whole becomes of utmost importance.

3.2.2 Overview of cases under discussion

Section 2.1.1 above presented an overview of cases relating to the right to defence and legal remedy. This complementary overview focuses on two additional cases: Judgment R.Const. 078/TSR of 4 May 2009 and

114 Judgment R.Const. 062 of 26 December 2007 reported in EM Wafwana and others *Jurisprudence. Cour suprême de justice. Contentieux constitutionnel et législatif* (2011) 59.
115 As above.
116 Art 61(5) of the 2006 DRC Constitution; art 4(2) of the International Covenant on Civil and Political Rights.

Judgment R.Const. 062 of 26 December 2007.[117] On 24 January 2009, the Provincial Assembly of Equateur adopted a vote of no-confidence against the petitioner without giving him an opportunity to defend himself in accordance with article 19 of the Constitution.[118] Whilst the Provincial Assembly invited him to defend himself a day before the vote, the petitioner found that less than 24 hours was not enough to prepare his 'defence'. He thus refused to appear before the Assembly. The Court rejected his argument on the grounds that the 48 hours provided under article 146(3) and 198 of the Constitution on which he relied are not meant to enable members of government facing the vote of no-confidence to prepare their defence.[119] Since he was invited to do so but preferred not to appear, he could not allege the violation of his article 19 rights to defence.[120]

The Court's precedent played an important role in its argumentative practice in this case. As the petitioner invoked a related case on the right to be heard, expecting the same standards to be applicable to him, the Court 'distinguished' the facts of this case from the previous case decided under Judgment R.Const. 062 of 26 December 2007. Similar to Judgment R.Const. 078/TSR of 4 May 2009, Judgment R.Const. 062 of 26 December 2007 relates to the removal of a provincial governor by the Provincial Assembly without granting the latter a chance to defend himself.[121] However, unlike the petitioner in Judgment R.Const. 078/TSR of 4 May 2009, the petitioner in Judgment R.Const. 062 of 26 December 2007 was not 'officially' invited by the Provincial Assembly since the Assembly thought it had no obligation to do so. He did not receive the official document containing the motion and accusations levelled against him.[122]

Recent decisions by the Court, including Judgment R.Const. 1737/1738/1739/1740/1741 of 3 May 2022 and Judgment R.Const. 1954 of 27 April 2023, illustrate its application of the right to defence in

117 There have been ever since several other cases which reaffirmed the Court's jurisprudence: Judgment R.Const. 1970 of 8 September 2023; Judgment R.Const. 2004 of 4 August 2023; Judgment R.Const. 1758/1759 of 18 November 2022.
118 Judgment R.Const. 078/TSR of 4 May 2009 reported in Wafwana and others (n 114) 65.
119 Judgment R.Const. 078/TSR (n 118) 66.
120 Judgment R.Const. 078/TSR (n 118) 65.
121 Judgment R.Const. 062 of 26 December 2007 reported in Wafwana and others (n 114) 59.
122 Judgment R.Const. 078/TSR (n 118) 65-66.

judicial and criminal proceedings. In both cases, the Court defined the normative content of this right. In the first, it annulled parliamentary resolutions that had revoked the mandates of five provincial Members of Parliament, on the grounds that they had not been notified or given the opportunity to defend themselves before the adoption of the adverse decisions.[123] In the second case, the Court upheld the constitutionality of the challenged provisions,[124] finding that they enabled the accused, who faced charges including participation in an insurrectional movement, incitement of military personnel to breach duty and discipline, unlawful possession of weapons and munitions of war, and high treason, to present their defence and to be assisted by legal counsel.[125]

3.2.3 Choice and application of methods of constitutional interpretation

Judgment R.Const. 469 of 26 May 2017, Judgment R.Const. 356 of 10 March 2017, Judgment R.Const. 152/TSR of 26 April 2011 and Judgment R.Const. 078/TSR of 4 May 2009 illustrate the Court's interpretive approach in the protection of rights to fair trial and due process of law. The approaches taken by the Court in Judgment R.Const. 469 of 26 May 2017 and Judgment R.Const. 356 of 10 March 2017 are similar. In the Judgment R.Const. 469 of 26 May 2017, the Court based its ruling on the importance of the rights to defence as a fundamental right that cannot be derogated and the scope of which cannot be narrowed.[126] Applying a systemic approach, the Court suggested that the importance of this right derives from its relationship with other similarly important values, including the right to life, and the prohibition of torture or slavery under article 61.[127]

In Judgment R.Const. 356 of 10 March 2017, the Court applied the textual approach to verify whether some of the conditions established for the respect of the rights to defence, namely that the individual is duly

123 Judgment R.Const. 1737/1738/1739/1740/1741 of 3 May 2022 57.
124 Ordinance-Law 78-001 of 24 February 1978 on the punishment of flagrant intentional offences which the accused claimed it violated art 18(1) of the Constitution which reads: 'Anyone arrested must be informed immediately of the reasons for his arrest and of any charges against him, in the language he understands.'
125 Judgment R.Const. 1954 of 27 April 2023 333.
126 Judgment R.Const. 469 (n 16) 9.
127 As above.

invited to defend themselves, are met.[128] In the Judgment R.Const. 152/TSR of 26 April 2011, the vote of no-confidence was quashed by the Court on procedural grounds, that is, the fact that the Standing Rules of Procedure of the provincial assembly were not valid because they had yet to be reviewed by the Constitutional Court.[129] In the absence of a constitutional provision submitting provincial assemblies Standing Rules of Procedure to a pre-application constitutional review, the Court applied systemic as well as teleological arguments to extract the drafter's intent that such Standing Rules should be reviewed in advance.[130]

However, in justifying its reasoning, the Court does not explain the nature and the source of the 'intent' of the drafters of the Constitution, the 'spirit' of the Constitution, and the extent to which they may be invoked in human rights litigation. Although analysis of some cases shows that the Court invoked the 'spirit' of the Constitution to enhance the protection of the rights to defence and the rights to legal remedy, the reasoning would be more transparent had it went further to explain how this spirit is extracted and where it can be used. This is, in part, because in some cases, the Judgment R.Const. 078/TSR of 4 May 2009 among other cases, where this spirit could have been applied in a manner that protects individual rights, the Court did not do so.[131] I agree more with Anderson that '[t]he search for the intentions of the framers is made obvious in the hope of finding out what they meant by the words they put into the written Constitution. This leads to the examination of various evidence outside the Constitution, and implies a feeling that there is a lack of clarity in the words of that document'.[132] Such 'various evidence' was never examined by the Court. The Court's teleological and purposive argumentation is uncertain and lacks an appropriate methodology.

Another issue relates to the special status of the right to defence and the right to legal remedy. Through a literal interpretation of article 61(5) of the Constitution, the Court ruled that the right to defence and the right to legal remedy have two levels of protection: they are fundamental

128 Judgment R.Const. 469 (n 3) 6.
129 According to art 160(2) of the Constitution, Standing Rules of Procedure of parliamentary chambers and Congress must be reviewed before their implementation. However, the Constitution is silent on whether Rules of Standing of Provincial Parliamentary Assemblies must undergo a similar scrutiny.
130 Judgment R.Const. 152/TSR (n 2).
131 Judgment R.Const. 078/TSR (n 118) 66.
132 W Anderson 'The intention of the framers: A note on constitutional interpretation' (1955) 49 *American Political Science Review* 340.

rights under article 19(3) and have been made non-derogable under article 61(5).[133] This reasoning strengthens the protection of the right at its core. A number of questions remain unanswered, nonetheless. How 'fundamental' one can consider the right to defence and legal remedy to be? Is it so simply by virtue of its constitutional recognition, or are there other considerations outside the Constitution that point to its 'fundamentality'? Does a hierarchy exist among rights, notably between those that are simply provided for under the Constitution and those that, in addition, have a special status, as in the case of the one provided under article 61(5)? If such a hierarchy exists, what are its implications? Despite these gaps in the Court's interpretive approach, the adjudication of the right to defence and legal remedy helped the Court to clarify the content and the scope of the right.

3.2.4 Implications for the rights to defence and legal remedy

The first Constitutional Court's attempt to define the right to defence and the right to legal remedy in an individual petition is in Judgment R.Const. 062 of 26 December 2007.[134] The Court held that 'the rights to defence [are] all the rights recognised to an individual who is a party to judicial proceedings or outside judicial proceedings, and who is the subject of an adverse measure that might lead to the adoption of sanctions against them'.[135] The beneficiaries of these rights are individuals irrespective of their status or nationality. One does not need to be part of legal proceedings to claim these rights: individuals simply ought to demonstrate that the measures may be unfavourable to their situations. Judgment R.Const. 062 of 26 December 2007 confirms that the Bill of Rights must be respected by all the organs of state.[136]

Through a literal and teleological approach to the text of the Constitution, the Constitutional Court attempted to extract the content of the rights to defence but did not elaborate on the scope of

133 Judgment R.Const. 469 (n 16).

134 As one notes, under the ambit of the Interim Constitution (2003) several constitutional decisions were adopted by the Supreme Court's Constitutional Chamber to protect the rights to defence.

135 Our translation. Original French: '... les droits de la défense comme étant l'ensemble des droits appartenant à une personne qui se trouve partie à un litige ou en dehors de tout procès, qui est l'objet d'une mesure défavorable ayant le caractère d'une sanction ou prise en considération de sa personne'.

136 Judgment R.Const. 062 (n 114) reported in Wafwana and others (n 114) 59-60.

each condition and modalities of their implementation. This leaves room for the Court to oscillate between different argumentative approaches.[137] The Court thus lacks a proper roadmap for clarifying the content of the rights to defence and the rights to legal remedy. The following characteristics emerge from the analysis of the Court's jurisprudence in relation to the right to defence of political officials before deliberative assemblies.

First, a person against whom a decision is about to be adopted and which can have an impact on his or her situation must be notified (informed), invited and be present during proceedings.[138] The invitation must indicate the place and the date of the hearing.[139] The Court excluded informal invitation, emphasising that the invitation should be formal (written).[140] The fact that a member of government claimed he would not attend any hearings against him should he be invited does not necessarily spare the deciding body from inviting him.[141] Equally, whether there exists *prima facie* evidence suggesting that the member of government subjected to the vote of no-confidence is guilty does not mean he should not be invited. Instead, the practice of the Court demonstrates that there is no duty imposed on members of government to attend the hearings before the final decisions is taken. When they do not appear, even though invited, the assembly can proceed with the examination of the motion and eventually adopt a final decision.[142] It came out clearly from the Judgment R.Const. 078/TSR of 4 May 2009 that defendants cannot oppose the invitations sent to them.[143]

Secondly, members of government who are the subject of the vote of no-confidence have the right to be heard before the legislative assembly adopts any motions against them.[144] They must be invited not before a specialised commission of the legislative body but before the body which is responsible for adopting a decision against the defendant. In Judgment

137 This may be said regarding Judgment R.Const. 078/TSR of 4 May 2009.
138 Judgment R.Const. 062 (n 114); Judgment R.Const. 060/TSR (n 2); Judgment R.Const. 078/TSR (n 137); Judgment R.Const. 137/TSR (n 2); Judgment R.Const. 469 (n 3); Judgment R.Const. 356 (n 3).
139 Judgment R.Const. 469 (n 3); Judgment R.Const. 356 (n 3).
140 Judgment R.Const. 469 (n 3).
141 In Judgment R.Const. 469 (n 3), the petitioner is said to have vowed he would not show up even if the Provincial Assembly invited him.
142 Judgment R.Const. 078/TSR (n 137).
143 Judgment R.Const. 469 (n 3).
144 Judgment R.Const. 062 (n 114); Judgment R.Const. 078/TSR (n 137); Judgment R.Const. 137/TSR (n 2).

R.Const. 469 of 26 May 2017, the Court sets aside the allegation that the defendant has been given the opportunity to present his defence before a specialised commission.[145]

Thirdly, defendants should be given an opportunity to respond to allegations against them.[146] The African Commission on Human and Peoples' Rights affirmed that individuals must be given 'adequate opportunity to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence'.[147] What is the minimum time granted to individuals to present their arguments in response to allegations against them? It is correct to say that in cases of the vote of no-confidence, members of government are given 48 hours to prepare their cases.[148] What is less clear is when the computation of the timeframe begins. In Judgment R.Const. 078/TSR of 4 May 2009, the Court interpreted the Constitution literally to conclude that the defendant was under the duty to present his arguments before the Assembly on the day that followed the reception of the notification. Under article 146(3) of the Constitution, debates aiming to discuss the merits of the motion and to hear the defendant must be held 48 hours after the vote of no-confidence motion has been deposited at the provincial assembly by the MPs who initiated it. If one is guided by bill-of-rights ideals, it seems logical to ensure that reasonable time is given to the member of government to prepare his or her argument. The formalistic interpretation the Court adopted failed to protect the petitioner's rights to defence and to legal remedy.

The Court inferred that drafters never intended that the 48 hours were meant to enable members of government subjected to votes of no-confidence to prepare their cases.[149] The Court ruling gives the impression that individuals who are the subject of a vote of no-confidence may even be required to appear before Parliament in the shortest time possible – say, two or three hours – provided they have been notified and given the

145 Judgment R.Const. 469 (n 3) 13.
146 Judgment R.Const. 062 (n 114); Judgment R.Const. 060/TSR (n 138); Judgment R.Const. 137/TSR (n 2).
147 African Commission on Human and Peoples' Rights 'Principles and guidelines on the right to a fair trial and legal assistance in Africa' (2003) 2 https://www.achpr.org/legalinstruments/detail?id=38 (accessed 12 November 2019).
148 Art 146(3) of the 2006 DRC Constitution.
149 Judgment R.Const. 078/TSR (n 137) reported in Wafwana and others (n 114) 66.

chance to appear before the deciding body.[150] The use of the 'intent' of drafters of the Constitution to argue that the latter never envisioned the possibility that the defendant should be notified prior to counting the 48 hours has hampered the effectiveness of the right to defence. Because the basis or source of the intent is not indicated in the decision, it is unclear how the Court arrived at its understanding of the drafters' intent.

An attempt to systematise the normative content of the right to defence before courts and tribunals was later made by the Court in Judgment R.Const. 1737/1738/1739/1740/1741 of 3 May 2022 and Judgment R.Const. 1954 of 27 April 2023, among others. In the latter, it ruled:[151]

> Enshrined in the Constitution of 18 February 2006 [...], the rights of the defence constitute an essential component of a fair trial [also provided for under international human rights treaties], whose authority, pursuant to article 215 of the said Constitution, prevails over that of ordinary legislation. These rights are inherent to all proceedings, whether contentious or non-contentious, and their observance is a fundamental requirement of any system aimed at safeguarding fundamental freedoms. These guarantees encompass, above all, the right of access to a court, which, in a democratic state, is of particular importance. Though not exhaustively, they essentially include: the right to be informed promptly and in detail of the nature and cause of the accusation in a language one understands; the right to self-representation or legal assistance; the right to examine prosecution witnesses and to present defence evidence under the same conditions; and the right to the assistance of an interpreter

A fundamental deficiency in the Court's jurisprudence concerning the right to defence in expedited criminal proceedings (*procès en flagrance*) resides in its inadequate consideration of the substantive nature and legal complexity of the cases at hand. A rigorous analysis of the charges in Judgment R.Const. 1954 ought to have compelled the Court to acknowledge that the serious and multifaceted character of the allegations rendered the application of an accelerated procedure inherently prejudicial to the rights of the accused. Such procedural expediency, when employed in cases of this magnitude, unduly curtails the temporal and procedural safeguards indispensable to the preparation of an effective defence, thereby contravening the essential tenets of fair

150 This analogy is made by the Court when it used Judgment R.Const. 062 (n 114) to distinguish from Judgment R.Const. 078/TSR of 4 May 2009.

151 Judgment R.Const. 1954 (n 125) 332.

trial guarantees enshrined in constitutional and international human rights law.

3.3 Political rights

In this section, I assess the type of arguments the Court applies in political rights petitions. I also examine how the Court construes the nature, the meaning and the scope of political rights. Finally, I discuss the implications of the Court's interpretive approaches for the protection of political rights.

3.3.1 Constitutional protection and scope of political rights

Four aspects of political rights are protected under articles 5, 6, 7, 8 and 14 of the Constitution: the right to vote; the guarantee of political pluralism; the prohibition of a one-party state; and the furtherance of women's political participation. The right to vote enables people to exercise their sovereignty directly or indirectly through their representatives. No individuals or group of individuals should be excluded arbitrarily from the political process. In fact, article 5(2) of the Constitution provides that '[n]o section of the people nor any individual may attribute [the exercise of sovereignty] to themselves'. Suffrage is universal, equal and secret. Although citizens above 18 years are allowed to take part in elections as voters and candidates, several limitations are imposed for specific positions, such as a minimum of 30 years or 25 years respectively for presidential and national legislative elections. Citizens deprived of their civil and political rights through judicial decisions are also excluded.[152] Limitations can also be imposed on Congolese living abroad.[153]

Specific protection is afforded to women to increase their participation in politics, address and eliminate discrimination and inequalities among men and women, and enhance their ability to contribute to development.[154] The Constitution protects the 'right' of women to 'equitable representation within national, provincial and local

152 Art 10 the 2006 General Electoral Law.
153 Judgment R.Const. 1879 of 20 December 2022.
154 Art 14(2) of the 2006 DRC Constitution.

institutions'.[155] The state, furthermore, must 'ensure the implementation of gender-parity between men and women in [national, provincial and local institutions]'.[156] The Interim Constitution provided for the right of women to a 'significant representation in national, provincial and local institutions'.[157] The progress evident in the two constitutions is largely attributable to the state's ratification of international human rights instruments that protect women's rights.[158] The progress has also been influenced by the active participation of national and international women's rights non-governmental organisations in the making of the Interim Constitution and final Constitution.[159] The 2013 Organic-Law on the Implementation of Women's Rights and Gender Parity (the Parity Act) recalls the DRC's international commitment to adopt 'legislative and administrative measures to give effect to women's rights'.[160] It defines gender parity as 'functional equality which consists of equal representation of men and women in access to decision-making bodies at all levels and in all areas of national life, without discrimination; in addition to the observance of numbers, it also indicates the conditions, positions and allocation [of powers]'.[161]

155 As above. See TM Makunya 'Beyond legal measures: A review of the DRC's initial report under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2023) 67 *Journal of African Law* 225-240.

156 Art 14(5) of the 2006 DRC Constitution.

157 2003 Interim DRC Constitution, art 51(4).

158 These instruments, as recalled under the Gender Parity Act (2015) include the Universal Declaration of Human Rights, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, the United Nations Convention on the Rights of the Child, the United Nations Convention on the Elimination of Discrimination Against Women, the Southern African Development Community Protocol on Gender and Development, and the United Nations Security Council Resolution 1325.

159 M Mantuba-Ngoma 'Les femmes et la reconstruction post-conflit en République démocratique du Congo' (2008) 3-4 http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/SHS/pdf/Femmes-RDC.pdf (accessed 12 April 2021).

160 Preamble to the Act 15/013 of 1 August 2015 on the Implementation of Women's Rights and Gender-Parity.

161 Art 3(11) of the Act 15/013 of 1 August 2015 on the Implementation of Women's Rights and Gender-Parity.

3.3.2 Overview of cases under discussion

In the run-up to the 2018 and 2023[162] general elections, several political events unfolded.[163] They have had serious implications for the political participation of individual candidates and voters at large. These events pertain to the validity of the Electoral Commission's decision to exclude various individuals from running for President or Parliament and prevent voters whose regions were affected by the Ebola health crisis or security issues from participating in elections.[164] The consideration of applications that emerged from these situations was a litmus test of the Constitutional Court's support for the democratic process. In the sections below, I summarise four cases where the Court, on the one hand, upheld the principle that presidential candidates must be of good moral character, and, on the other, endangered popular participation.

Upholding good morals in public affairs

Three rulings, namely Judgment RCE 002, Judgment R.Const. 126 of 21 November 2015 and the Judgment RCE 0005/0006/PR of 3 September 2018 demonstrate how the Court can go the extra mile to uphold certain principles and standards that presidential candidates should meet.

In Judgment RCE 002, the Court decided on whether the decision by the electoral commission to exclude Mr Jean-Pierre Bemba, formerly convicted by the International Criminal Court for bribing witnesses,[165] from running for President was valid.[166] The Constitutional Court ruled that bribing witnesses is a variant of corruption that domestic and

162 See also Judgment R.Const. 1751 of 3 May 2022 where the Court rejected a petition against an electoral calendar as it is an administrative decision;

163 Mbaya (n 92) 62-63; JC Hengelela & MA Muhima 'Compétence de la Commission électorale nationale indépendante en matière d'élaboration du calendrier électoral: Fondements juridiques, limites et instrumentalisation politique' (2019) 2(1) *Revue congolaise d'analyse des politiques et pratiques électorales* 138-144.

164 Judgment R.Const. 2120 of 14 December 2023. See broadly DS Asha 'Note juridique sur l'opinion dissidente du juge Corneille Wasenda en marge de l'arrêt *R.CE 1/PR.CR* rendu en réponse à la requête contre la décision portant publication des résultats provisoires de l'élection présidentielle' (2018) 3 *Annuaire congolais de justice constitutionnelle* 612.

165 'ICC Appeals Chamber acquits Mr Bemba from charges of war crimes and crimes against humanity' https://www.icc-cpi.int/Pages/item.aspx?name=pr1390 (accessed 12 November 2019).

166 Judgment RCE 002 (n 3). See also African Commission Communication 709/19 *Sénateur Jean-Pierre Bemba Gombo c. République démocratique du Congo*, adopted in July-August 2024.

international legal instruments alike prohibit.[167] Using a teleological argument, the Court held that Bemba could not be allowed to run for President because his behaviour 'undermined public faith at a time when the legislator undertook to amend the electoral law in December 2017 to regulate behaviour of political actors by strengthening the conditions of eligibility of candidates for the various elections'.[168] The exclusion of a person convicted and sentenced for corruption from presidential elections aims to 'moralise the behaviour of political actors'.[169]

In another case, the Court resorted to extra-legal arguments to explain the meaning of a constitutional provision. In Judgment R.Const. 126 of 21 November 2015, it used the necessity to 'consolidate democracy' and 'strengthen discipline within political parties' to explain the rationale behind the loss of parliamentary mandate when MPs voluntarily resign from their political party.[170] In Judgment RCE 0005/0006/PR of 3 September 2018, the petitioner challenged the Electoral Commission's decision to exclude him from running for President. The decision of the Electoral Commission was based on the fact that Mr Muzito, having been a member of a political party and having occupied a position in Parliament under the umbrella of that party, could have not run for President since his party already had a presidential candidate and this would have caused confusion among members of the party.[171] The Court accepted the Electoral Commission's line of reasoning and confirmed the exclusion of Mr Muzito from running for President.[172]

Undermining popular participation

Two decisions are worth discussing in this section: Judgment RCE 001/PRCR of 19 January 2019 and Judgment R.Const. 0005 of 19 February 2016. Judgment RCE 001/PRCR of 19 January 2019 is a presidential election petition and not directly related to human rights; however,

167 As above.

168 My translation. The original French reads: *'a porté atteinte à la foi publique au moment où le législateur s'est engagé dans la révision de la loi électorale du décembre 2017 à moraliser le comportement des acteurs politiques par le renforcement des conditions d'éligibilité des candidats aux différents scrutins'.*

169 Judgment RCE 002 (n 3).

170 Judgment RConst 126 of 21 November 2015.

171 Judgment RCE 0005/0006/PR of 3 August 2018 reported in 3 *Annuaire congolais de justice constitutionnelle* (2018) 496.

172 Judgment RCE 0005/0006/PR(n 171) 496-497.

some of the matters dealt with by the Court are directly related to the participation of individuals in the political process. In December 2018, the Electoral Commission adopted two major decisions that adversely affected the participation of certain citizens in elections. It decided that the persistence of the Ebola health crisis in the North-Kivu region was not conducive to the organisation of elections in two electoral districts (Beni and Butembo), which entailed that more than one million individuals would not elect the President.[173] It also decided that rampant insecurity in the region of Yumbi impugned the proper conduct of elections in this region.[174]

In Judgment RCE 001/PRCR of 19 January 2019, the petitioners urged the Court to declare that the exclusion of Beni, Butembo and Yumbi voters from participating in elections violated their right to vote.[175] The Court ruled that this was a *force majeure* and warranted the exclusion of certain individuals from the electoral process.[176] In this case, although preventing the spread of Ebola virus and ensuring security for voters were said to be legitimate governmental purposes, the Court did not examine whether the Electoral Commission had explored less intrusive means to the violation of rights, such as the postponement of general elections, as the minority decision suggested.[177] The Court also did not articulate how preserving the health of voters and their security could be used as 'government legitimate purpose' to justify the exclusion of voters from participating into elections.[178] The Electoral Commission decision was also said by the minority not to be 'a law of general application'[179] that could limit the enjoyment of rights.

In Judgment R.Const. 0005 of 19 February 2016, the Court ruled that requiring citizens running for office to have five years' work experience in

173 T Makunya 'Voting in the Democratic Republic of Congo (DRC) against all odds: An account of the 30 December 2018 elections in one of the polling centres' (*AfricLaw*, 4 January 2019) https://africlaw.com/2019/01/04/voting-in-the-democratic-republic-of-congo-drc-against-all-odds-an-account-of-the-30-december-2018-elections-in-one-of-the-polling-centres/ (accessed 19 December 2019).

174 See also Judgment RCE 001/PR/CR of 19 January 2019.

175 Judgment RCE 001/PR/CR (n 174).

176 Judgment RCE 001/PR/CR (n 174). See also Judgment R.Const. 2120 (n 164) in relation to the participation of citizens living under the M23 occupation and in Kwamouth.

177 Judgment RCE 001/PR/CR (n 174), dissenting opinion 3.

178 Judgment RCE 001/PR/CR (n 174).

179 Judgment RCE 001/PR/CR (n 174), dissenting opinion 3-4.

administration was not discriminatory.[180] The petitioner challenged the constitutional validity of the 2015 amendment to the Electoral Law as it might lead to the exclusion of certain individuals.[181] The amendment required candidates to parliamentary elections to prove at least five years' experience in political, administrative or socio-economic fields. The Court found that the impugned provisions of the amendment Act could not be understood as excluding other fields of specialisation since what was required was merely administrative experience in whichever field.[182]

Upholding the integrity of the electoral process

Seven presidential candidates brought a petition before the Electoral Commission challenging the regularity of the 2023 presidential elections. They argued, among others, that the Commission's failure to publish the voters' list in accordance with electoral legislation, to provide security personnel or diplomatic passports to presidential candidates, to monetise the issuance of voter registration cards, and to enable voting for citizens residing in territories under the control of the M23 rebel group in Nord-Kivu province, collectively undermined the integrity of the electoral process.[183]

The Constitutional Court began by affirming its jurisdiction to adjudicate matters concerning the regularity of the electoral process, relying on its prior jurisprudence.[184] It underscored the necessity of reviewing the legality of electoral acts and conduct to ensure inclusive participation and to subject acts that adversely affect democracy and the rule of law to constitutional scrutiny.

The Court dismissed the petitioners' claims, reasoning that certain allegations pertained to the individual responsibility of electoral officials, and that the applicants had failed to demonstrate that such conduct constituted part of a deliberate scheme orchestrated by the Independent National Electoral Commission (CENI). It further held that the exclusion of voters in territories under rebel control amounted

180 Judgment R.Const. 0005 (n 3).
181 Judgment R.Const. 0005 (n 3).
182 Judgment R.Const. 0005 (n 3).
183 Judgment R.Const. 2120 (n 164).
184 Judgment R.Const. 338 of 17 October 2016 and Judgment R.Const. 1879 (n 153).

to a case of *force majeure*, and that the remaining allegations did not rise to the level of impairing the integrity of the electoral process.

3.3.3 Choice and application of methods of constitutional interpretation

In this section, I look at two features of the Court's interpretive approach to political rights: the application of textual arguments and the application of teleological arguments. The last part examines the implications of these approaches for the protection of political rights. The section examines cases already discussed but so too Judgment R.Const. 0038 of 28 August 2015 and Judgment R.Const. 624/630/631 of 30 March 2018 discussed earlier, as aspects of them relate to political rights as well as Judgment R.Const. 1879 of 20 December 2022 and Judgment 2120 of 14 December 2023.

The use of textual arguments in political rights cases

The words of constitutional provisions to be interpreted are generally the starting-point of the Court's interpretive approach.[185] In Judgment R.Const. 0038 of 28 August 2015, the Court ruled that because the individual was sentenced to jail only after he had submitted his candidacy, his status as senator could not be nullified.[186] The Court read article 110(8) of the Constitution formalistically to suggest that, for a parliamentary mandate to be nullified, the individual must have been convicted before, and not after, they submitted their application to the electoral commission.[187]

According to Kalubi, following the Court's line of reasoning, the Senate (or political institutions as a whole) might become a reservoir for 'white-collar criminals' and individuals lacking proper morals.[188] The choice of strict textualism is generally supported by the belief in the general principle of law that, as van de Kerchove puts it, 'interpretation

185 Judgment R.Const. 250/TSR of 11 March 2015. This case shows that a textual approach is appropriate for solving the issue at hand when the case does not manifest the presence of competing interests, either among different individuals or between individuals and state organs. See A Gutmann 'Preface' in A Scalia (ed) *A matter of interpretation* (1998) x.

186 Judgment R.Const. 0038 of 28 August 2015.

187 As above.

188 Kalubi (n 4) 212.

stops when the text is clear'.[189] How does one know a text is clear without interpreting it? Constitutional rights provisions may not always be clear and strict compliance with the text might lead to undesirable outcomes.[190] John Marshall is said to have noted that interpreters must not forget they are interpreting the 'Constitution' rather than separate words, clauses or sentences.[191] For Marshall, interpreters must consider the whole structure of the Constitution. Systemic interpretation helps the interpreter consider the relationship among provisions of the Constitution. Furthermore, constitutional litigation, unlike ordinary civil litigation, goes beyond individual interests, as it seeks objectively to protect the Constitution, democracy and social peace.[192] Judgment R.Const. 0038 of 28 August 2015 demonstrates that textualism can lead to absurd outcomes (such as allowing people with criminal records to become parliamentarians).

Adopting strict textualism as an approach to interpretation may also suggest that the Court is unwilling to examine and give effect to the rationale behind, or purpose of, some constitutional rights to embrace a culture promotive of human rights. For example, one opportunity for doing this was offered to the Court in Judgment R.Const. 624/630/631 of 30 March 2018. There was a possibility that the Court could have engaged with the principle of political pluralism (article 6) and the right to freedom of association (article 36), and assess the interplay between the two principles and rights in furthering the participation of independent candidates and small political parties in elections. The implicit outcome of the amendment to the Electoral Law is that independent candidates are forced to register with political parties, since being independent does not give them a chance to attain the one (1) per cent threshold. Similarly,

189 M van de Kerchove 'La doctrine du sens clair des textes et la jurisprudence de la Cour de cassation de Belgique' in M van de Kerchove (ed) *L'interprétation en droit: Approche pluridisciplinaire* (2019) 13; M Troper, J-L Gardies & C Grzegorczyk 'Statutory interpretation in France' in DN MacCormick & RS Summers (eds) *Interpreting statutes: A comparative study* (1991) 182.

190 M Fromont *Justice constitutionnelle comparée* (2013) 280; A Barak 'Constitutional interpretation' in F Melin-Soucramanien (ed) *L'interprétation constitutionnelle* (2005) 97.

191 AR Amar 'Introduction to the new edition' in A Scalia *A matter of interpretation* (2018) xxi.

192 B Kahombo 'Note juridique critique sur l'arrêt *RCE 001/PR/CR* de la Cour constitutionnelle du 19 janvier 2019 relatif à l'affaire de la contestation des résultats de l'élection présidentielle du 30 décembre 2018' (2018) 3 *Annuaire congolais de justice constitutionnelle* 576-577.

the imposition of a one (1) per cent threshold implies that small parties must be forced to enter into coalitions with big parties or platforms.[193] A trend in domestic and regional jurisprudence seems to suggest that these two hypotheses are constitutive of the violation of the rights to political participation and of freedom of association; however, the DRC Constitutional Court did not make such a connection.

The examples of the African Court on Human and Peoples' Rights (African Court) and the South African Constitutional Court are cited here to illustrate such a trend. In *Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R Mtikila v Tanzania*, the African Court ruled that 'freedom of association is negated if an individual is forced to associate with others. Freedom of association is also negated if other people are forced to join up with individual. In other words freedom of association implies freedom to associate and freedom not to associate'.[194] The South African Constitutional Court found that '(o)nce an adult citizen is forced to exercise [the right to stand for public office and, if elected, to hold office] through a political party, that divests her or him of the very choice guaranteed by section 19(1) not to form or join a political party'.[195] The South African Constitutional Court goes even further to invoke possible violation of the right to human dignity. According to the Court:

> Woolman says 'associational freedom prevents the state and other powerful social actors from determining the most basic contours of our lives through coercion'. Coercion implicates the right to dignity. Who one associates with or whether one associates at all are so close to the inner self that it is an affront to who one truly is and, indeed, an assault on one's dignity, to be told who to associate with or to associate when you do not want to. And why coercion of this nature impinges on dignity is because dignity underlies all other fundamental rights [footnote omitted].[196]

The comparison with the African Court and South Africa here is functional: although the DRC Electoral Law did not prevent independent candidates, it made being independent undesirable,

193 This was in fact the reasoning of the Court. See also Judgment R.Const. 1826 of 29 December 2022.

194 *Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R Mtikila v Tanzania* (merits) (2013) 1 AfCLR 55, para 113.

195 *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* 2020 (6) SA 257 (CC) para 18.

196 *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* 2020 (6) SA 257 (CC) para 60.

difficult and unprofitable, such that the choice to be independent was in fact limited.[197]

Additional observation of the Court's reluctance to foster women's political participation can be made. In Judgment R.Const. 624/630/631 of 30 March 2018, the Court rejected the interpretation that the drafters of the Constitution intended, through article 14, to have equal numbers of men and women on the ballot paper.[198] The Court ruled that although the absence of women on the list does not invalidate the list, the fact that article 13 obligates political parties to have women on electoral lists could be seen as promoting 'equitable representation' of women in the electoral process.

Understood in its systemic context, the Court disregarded the purpose of article 14 of the Constitution which aimed at combatting any forms of discrimination against women and at promoting and protecting their rights.[199] Article 14 enjoins the state to adopt appropriate measures to ensure 'total blossoming and full participation of the woman to the development of the nation'.[200] Article 14(4) speaks to 'equitable representation' of women within national provincial and local institutions, while article 14(5) institutes the principle of gender parity between men and women as a state obligation. Parity in number[201] between men and women in politics and political parties may be the starting-point for achieving gender parity as provided for under the Constitution, since the notion of 'parity' encompasses the sense of 'equality of number' or 'mathematical equality'.[202] During the constitution-making process, some participants believed the new constitution should ensure 'significant representation' of women, while others suggested 'equal and equitable' representation. This latter understanding led to the incorporation of the principle of gender parity.[203]

197 See the discussion in Mbaya (n 92) 75-88.
198 Judgment R.Const. 624/630/631 (n 3).
199 The 2003 Interim Constitution guaranteed the right to 'significant representation of women' in political institutions. To this effect, see art 51(4) art 99(2) and art 105(2) of the 2003 Interim Constitution in Wetsh'Okonda Koso Senga (n 90) 390; 392.
200 My translation. The original French text reads: *'le total épanouissement et la pleine participation de la femme au développement de la nation'.*
201 CA Lindberg (ed) *The Oxford American thesaurus of current English* (1999) 538.
202 G Cornu (ed) *Vocabulaire juridique* (2018) 1558.
203 Kangashe (n 79) 75.

The Court's ruling seems to assume that gender parity is an ideal, a goal to be achieved and not a means to an end.[204] Women should be encouraged to be competitive.[205] During the constitution-making process, some participants believed that more than half of women were 'illiterate' and that others were reluctant to embrace a political career; if political parties were forced to have equal numbers of women and men for their electoral lists to be valid, they suggested, this would result in injustice against men because female candidates would be hard to find.[206] These views, and along with them the Court's interpretive approach, are influenced by societal patriarchal inclinations, with the Court itself having been composed of nine male judges at the time of the decision[207] and operating in a largely patriarchal society.[208] The Court would have gained insight had it resorted to the burgeoning body of international human rights instruments and jurisprudence that properly defines women's rights to political participation, such as is the case with article 9 of the Maputo Protocol.[209] If an equal number would be detrimental to the advancement of political parties, an incremental approach of

204 Judges who dissented in this case did not equally address the issue of women's political participation.

205 Kangashe (n 79) 80. At the time of the ruling, Kangashe J, who held these views in his book, sat on the Constitutional Court. Arguments linked with the non-arithmetical or mathematical nature of gender parity resemble the views he expressed in his book. These views against women's political participation are mainstream within the Congolese society. A Court made up of nine male judges would certainly have not thought to extend the scope of women's rights. See also TM Makunya 'Fostering a gendered approach to peacebuilding in the African Great Lakes Region: Perspectives from the Democratic Republic of Congo' 13 October 2021 in Kujenga Amani https://kujenga-amani.ssrc.org/2021/10/13/fostering-a-gendered-approach-to-peacebuilding-in-the-african-great-lakes-region-perspectives-from-the-democratic-republic-of-congo/ (accessed 21 October 2021).

206 Kangashe (n 79) 80.

207 Since then, two female judges, Alphonsine Kalume Asengo Cheusi and Marthe Odio Nonde, joined the Court.

208 JR Oppong & T Woodruff *Democratic Republic of Congo* (2007) 48-50; MC Vinas 'Gender audit of the Peace, Security and Cooperation Framework for the Democratic Republic of Congo and the Region' (October 2015) 26 https://www.international-alert.org/sites/default/files/Gender_AuditDRC_EN_2015.pdf (accessed 29 March 2021).

209 In its approach, the Court failed to consider the body of international human rights instruments ratified by the DRC in understanding the nature, the meaning and scope of women's right to equitable representation in the political process. See generally TT Mkali & A Rudman 'Art 9: Right to participation in the political and decision-making process' in A Rudman, CN Musembi & TM Makunya (eds) *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: A commentary* (2023) 201-222.

a minimum obligation of 30 per cent representation of women in Parliament, for instance, could be the starting-point, or a system of electoral gender quotas for women's special elections on separate lists, as some countries have done.[210] The examples of Uganda, Rwanda and Tanzania show how countries willing to increase women's participation can design their electoral systems to enable voters to vote separately for women's members of parliaments, thereby maximising in quantity and quality women's political participation in the country.[211]

The application of teleological arguments to political rights cases

In several political rights cases, the Court (mis)uses teleological arguments. This results in a degree of interpretive obscurantism, mainly because the Court does not sufficiently explain the concepts it invokes. These include 'democracy', 'regulation of politics', the 'moralisation of politics', 'rationalisation of [the] electoral system', 'conflict of interest',[212] and '*force majeure*'. Moreover, the Court does not indicate whether the facts of the cases required the use of these arguments, or if so, the circumstances (criteria) under which it can resort to them. This would circumvent the cherry-picking of arguments, given that the concepts have different meanings in different circumstances. For instance, Wasenda J, in his dissenting opinion, challenged the appropriateness of the use of '*force majeure*' in *Judgment RCE 001/PRCR* of 19 January 2019. He suggested that instead of applying the *force majeure* argument to exclude voters from participating in elections, the Court should have construed the application of *force majeure* to postpone general elections.[213] Similarly, Hengelela and Mapela argue that the notion of 'conflict of interest' –

210 S Vyas-Doorgapersad & TM Lukamba 'The status and political participation of women in the Democratic Republic of Congo (1960-2010): A critical historical reflection' (2011) 62 *New Contree* 105. See the discussion in G Bauer & JE Burnet 'Gender quotas, democracy, and women's representation in Africa: Some insights from democratic Botswana and autocratic Rwanda' (2013) 41 *Women's Studies International Forum* 103.

211 Art 75(7) of the 2003 Rwandan Constitution as amended. See V Wang & MY Yoon 'Recruitment mechanisms for reserved seats for women in parliament and switches to non-quota seats: A comparative study of Tanzania and Uganda' (2018) 56(2) *Journal of Modern African Studies* 299-324; A Clayton, C Joseffson & V Wang 'Quotas and women's substantive representation: Evidence from a content analysis of Ugandan plenary debates' (2016) *Politics and Gender* 1-29.

212 Art 15 & 110 of the 2006 General Electoral Law as amended.

213 Asha (n 164) 592.

on the basis of which Muzito was prevented from running for president in *Judgment RCE 0005/0006/PR* of 3 September 2018 – could not be viewed as a ground for exclusion of individual candidates.[214]

3.3.4 Implications for the protection of political rights

The examination of the small number of cases related to political rights shows that the Court has not taken a robust, purposive approach to construing political rights in a manner that advances their underlying ideals. Judgment R.Const. 0038 of 28 August 2015 shows that the necessity to ensure that the political space is not dominated by 'white-collar criminals' was not considered when the Court examined the possibility of whether an MP convicted for embezzlement can continue to serve in Parliament.[215] The Court's passive approach in Judgment R.Const. 624/630/631 of 30 March 2018 *vis-à-vis* the right of independent candidates, small political parties and women's candidates did not enable it to enhance popular participation in the political process.

As Jayawickrama demonstrates, there is need at this stage for the Court to shift its examination from the purpose of the law being examined, as it did, to the projection of possible outcomes the legislation can have if its constitutional validity is confirmed. For an apex constitutional jurisdiction whose decisions have wide impact on the country's legal and political systems, it appears self-defeating to rely simply on reasons invoked by Parliament in enacting legislation, when, on the face of it, the legislation is clearly an affront to the participation of political parties and independent candidates. Consequential reasoning can be combined with deontological and formalistic reasoning to enable the Court to form a reasoned opinion of constitutional issues. A proactive and consequential approach could also have allowed individuals whose rights were violated in Judgment RCE 001/PRCR of 19 January 2019 to understand the extent to which a health crisis such as Ebola or insecurity may be used as an excuse not to organise voter operations. In fact, rather than safeguard

214 A-DN Luaba Lumu 'Role of the Constitutional judge in the settlement of electoral disputes: State of play, challenges and prospects' (2018) 3 *Annuaire congolais de justice constitutionnelle* xxvii; JC Hengelela & JJK Mapela 'Conflit d'intérêt au sein d'un parti politique comme motif d'invalidation d'une candidature à une élection présidentielle: Une étude de l'arrêt *RCE 5/6/PR* de la Cour constitutionnelle du 3 septembre 2018' (2018) 3 *Annuaire congolais de justice constitutionnelle* 511-512.

215 Kalubi (n 4) 212.

individuals' rights, the state-centred position in Judgment RCE 001/PRCR of 19 January 2019 could set a bad precedent for future health and security crises, thereby jeopardising the political participation of many more individuals. The Electoral Commission decision was *reactionary,* whereas the Court was expected to be *progressive* on that particular matter.

4 Aids to constitutional interpretation used by the Constitutional Court

The 2006 Constitution is silent on the way the Constitution should be interpreted by the Constitutional Court. The assumption perhaps is that, as legal rules, constitutional norms can be interpreted using the classical canons of legal interpretation that courts generally apply.[216] The Constitutional Court has not provided any guidance either on the way constitutional norms should be construed. However, the Constitutional Court has used international law and precedents as aids to constitutional interpretation at varying degrees.

4.1 International law as an aid to constitutional interpretation

The Constitution is silent on the use of international law-related arguments as interpretive tools. In terms of article 153(4), 'duly ratified treaties' form part of the sources courts and tribunals may apply in a litigation. This position of international law norms flows from article 215 of the Constitution which accords international treaties and agreements 'an authority superior to that of the law' after they have been 'duly ratified' and 'published'. They form part of the country's legal order and may be invoked as formal sources of law.

International law has not been relied upon frequently and openly by the Court.[217] However, in Judgment RCE 002 of 3 September 2018, the Constitutional Court resorted to the 2003 United Nations Convention Against Corruption,[218] the 2003 African Union Convention on

216 N Mwene Songa *Interprétation, cassation et annulation en droit congolais* (2013) 24-44.

217 Previous cases where it has been used include Judgment R.Const. 04/TSR (n 2), Judgment R.Const. 166/TSR of 19 August 2011 relating to the constitutional validity of an Act Suppressing Forced Labour.

218 The Convention entered into force on 14 December 2005. The DRC acceded to it on 23 September 2010.

Preventing and Combating Corruption,[219] and the 1998 Rome Statute on the International Criminal Court[220] to construe the meaning and scope of the concept of 'corruption'.[221] The use of international law is attributable to the fact that the Electoral Commission used international law instruments to exclude a presidential candidate who was previously convicted for corruption in accordance with article 70(1)(c) of the Rome Statute on the International Criminal Court.[222] It is also attributable to the nature of the case itself: the petitioner, prior to submitting his application as presidential candidate, was detained at the International Criminal Court for 10 years on charges of war crimes, crimes against humanity,[223] and bribing witnesses.[224]

The application of international law norms in this case seems progressive. The Court's approach was far-reaching: it used these treaties to find indirectly that bribing witnesses formed part of crimes under the Congolese legal framework. This derives, according to the Court, from the obligation to incorporate international law norms.[225] The Congolese

219 The Convention entered into force on 5 August 2006. The DRC signed the Convention on 5 December 2003.

220 The Statute entered into force on 1 July 2002. The DRC ratified it on 11 April 2002 (the decree of ratification was adopted on 30 March 2002 and published in the official gazette on 5 December 2002).

221 Art 10(1)(3) of the 2006 General Electoral Law bans individuals who have been sentenced for corruption from running. Under its decision 28/CENI/BUR/18 of 24 August 2018, the Electoral Commission rejected the application of Jean-Pierre Bemba to presidential elections because he was sentenced by the International Criminal Court for 'corrupting witnesses' in its judgment of 8 March 2018, Appeal Chamber.

222 The provision reads: '1. The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally:
(c) Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence.'

223 'ICC Appeals Chamber acquits Mr Bemba from charges of war crimes and crimes against humanity' https://www.icc-cpi.int/Pages/item.aspx?name=pr1390 (accessed 12 November 2019).

224 Judgment RCE 002 (n 3).

225 Judgment RCE 002 (n 3), para 18 & 19. For criticism of the eclectic application of international law, see A Bayenga 'Inéligibilité pour subornation de témoins ou insubordination du juge électoral à l'autorité de la loi? "L'arrêt Bemba" de la Cour constitutionnelle tiraillé entre l'autonomie proclamée du droit pénal et l'autonomie réclamée du droit électoral' (2019) 1 *Revue congolaise d'analyse des politiques et pratiques électorales* 93, 105-106.

Criminal Code could thus be viewed as a municipal law that gives effect to the UN Convention in matters of corruption.[226]

However, in cases where the petitioners do not invoke international law norms, the Court seems to refrain from invoking them. For example, in Judgment R.Const. 624/630/631 of 30 March 2018, the Court refrained from invoking article 9 of the 2003 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)[227] on the right to political and decision-making process. Article 9 of the Maputo Protocol provides that '[s]tates parties shall take specific positive action to promote participative governance and the equal participation of women in the political life of their countries through affirmative action ...'. The Court, including judges in their opinions,[228] did not use article 153(4) of the Constitution to create synergy between domestic and international law norms and increase the quality of human rights protection.

The absence of a clear methodology guiding on the use and application of international law in constitutional (rights) adjudication seems detrimental to furthering a human rights culture. It highlights the passive role judges play in a legal system, since they passively await the invocation of international (human rights) standards or norms by parties rather than by themselves *suo muto*.

4.2 The role of precedents in the Court's interpretive practices

The examination of the Court's jurisprudence reveals an existing practice by individual petitioners and the Court itself to rely on the Court's previous decisions. In most instances, this is done to explain the existence

226 Art 63(6) of the Convention obligates state parties to report on 'legislative and administrative measures' they have taken to implement the Convention.

227 The Protocol entered into force on 25 November 2005. The DRC acceded to it on 9 June 2008.

228 PP Kumakinga 'La promotion de la démocratie dans la fonction juridictionnelle de la Cour constitutionnelle: À propos de la pratique des opinions dissidentes et individuelles par les juges constitutionnels de la République démocratique du Congo' (2018) 3 *Annuaire congolais de justice constitutionnelle* 10-15. On separate opinions in general, see A Dyevre 'The French Constitutional Council' in A Jakab, A Dyevre & G Itzcovich (eds) *Comparative constitutional reasoning* (2017); A Jakab, A Dyevre & G Itzcovich 'Introduction' in A Jakab, A Dyevre & Giulio Itzcovich (eds) *Comparative constitutional reasoning* (2017) 24-25; K Kelemen 'Dissenting opinions in constitutional courts' (2013) 14 *German Law Journal* 1370-1371.

of a coherent and consistent practice in the way the Court has dealt with petitions. Petitioners use this opportunity to bring to the attention of the Court its consistent position in relation to the admissibility of petitions based on the necessity to uphold the rule of law and fundamental rights.

The Court also frequently recalls its position as adopted in previous decision, as was the case in Judgment R.Const. 1272 of 4 December 2020.[229] In this decision, the Court notes 'that in pursuit of the ideal of the rule of law derived from article 1 of the Constitution of the Republic, it has, through its jurisprudence, extended its jurisdiction to only acts of assembly' (emphasis added). The role of the Court as a creator of legal rules to improve the protection of fundamental rights is no longer debatable. Nonetheless, according to the Court, extending its jurisdiction by way of its interpretive powers must be exercised under specific conditions.[230] In two other cases, the Court distinguishes its precedents to demonstrate how rules and principles progressively developed under its jurisprudence could not be applicable to those new cases.

In the Judgment R.Const. 078/TSR of 4 May 2009, the Court excludes the application of principles developed in an earlier case based on the difference in facts. Similarly, in Judgment R.Const. 126 of 21 November 2015, where a party invoked an earlier case to argue that the Court could not decide a matter twice based on *non bis in idem* and *res judicata* principles, the Court distinguished the two cases based on differences among the identity of parties, the facts of the case, the remedy sought, and the rationale.[231]

The explanation above demonstrates the progressive role the Court's previous decisions play in furthering human rights. Such protection increases with the possibility that the Court's previous decisions are invoked not only by the parties but also by the Court itself of its own volition.

5 Interpretation of limitation to the Bill of Rights

In the absence of a general limitation clause, the Court has not developed a particular approach to the interpretation of limitations to the Bill of

229 Judgment R. Const. 1272 (n 3).
230 Judgment R. Const. 1272 (n 3).
231 Judgment R. Const. 126 of 21 November 2015 reported in Journal Officiel de la République démocratique du Congo du 1er Janvier 2016 at 23.

Rights. In the rare cases where it decided on limitations, its reasoning was too laconic for one to discern an emerging theory on the interpretation of limitation. In Judgment R.Const. 624/630/631 of 30 March 2018, the Court's literal interpretation did not enable it to examine the possible substantive outcome regarding the fate and the participation of small political parties *vis-à-vis* large political platforms. The Court ruled that limitations to rights were justified by the need to 'rationalise the electoral system' by preventing the creation of many political parties and candidates, which in the past led to the loss of votes.[232]

It also indicated that limitations are not disproportionate since they aim to 'combat the fragmentation of the political landscape by favouring the creation of broad political actors platforms and groupings within broad ideological groups thus ensuring coherence in the governance of the state'.[233] Clearly, the Court inappropriately construed the proportionality test. Its argumentative approach disregarded alternative solutions or less intrusive means the state could have adopted. In practice, the amendment resulted in the exclusion of independent candidates from the 2018 general elections and enabled materially endowed political parties and groupings to field candidates in many districts. It facilitated the victory of big political-party platforms to the detriment of lists that garnered sufficient popular support at the local or provincial levels.[234] This, in the dissenting views of Epotu J, Kangashe J, te Pemako J and Wasenda J, suppressed the expression of a diversity of opinions, which is an important feature of political pluralism as entrenched under article 220(1) of the Constitution.[235] The law did not reduce the number of political parties, but instead forced fringe parties to enter into coalition with big parties, sometimes even if they had no ideological alignment with them.[236]

While assessment of the purpose of legislation remains an important test for ascertaining the constitutionality of legislation, as the Court did, it should be but the starting-point of interpretation of the limitations to

232 In their dissenting opinion, Epotu J, Kangashe J, te Pemako J & Wasenda J noted that the Court failed to balance the competing rights or interests; on the one hand, the necessity to rationalise the electoral system and, on the other, respect for political pluralism as a constitutionally entrenched principle.
233 Judgment R.Const. 624/630/631 (n 3).
234 Mbaya (n 92) 80-81.
235 Dissenting opinion by Epotu J, Kangashe J, te Pemako J & Wasenda J.
236 Mbaya (n 92) 75-88.

fundamental rights.[237] Relying on the jurisprudence of the Zimbabwean and Canadian supreme courts, Jayawickrama points out that legislation might be constitutional in its purpose yet flawed in its effects.[238] In other words, 'if a law with a valid purpose interferes by its impact, with rights or freedoms, a litigant could still argue the effects of the legislation as a means to defeat its applicability and possibly its validity'.[239] Consequential reasoning may thus do more to unveil the constitutional anomalies of legislation and enhance human rights protection than formalistic or legalistic reasoning.

Limitations may also be grounded in *force majeure* where the ability of certain citizens to vote is significantly hindered by security concerns[240] or by the necessity to safeguard higher constitutional values, for example, the imperative to organise presidential elections within the constitutionally mandated timeframe, thereby preventing the extension of the presidential mandate beyond the five-year term limit. This may justify the exclusion of the vote of Congolese citizens residing in countries where, due to purely technical constraints, the organisation of elections proves unfeasible.[241]

6 Conclusion

The DRC's 20 years of constitutional adjudication and interpretation of human rights under its 2006 Constitution are rich in lessons. These pertain to how the Constitutional Court can build principles and rules that enhance a human rights culture and the democratic process. The Court uses the textual, purposive and systemic methods to interpret the Bill of Rights. The analysis of selected cases shows that, as with the Benin Constitutional Court, the preference is for literalism over other methods: the Court rarely uses, and creates synergies among, a variety of methods of interpretation.

Furthermore, the approach taken to international human rights law remains timid, parochial and unmethodological. Whilst the use of international law indicates some progress in helping the Court understand the content of various rights, the cases reviewed in this

237 Jayawickrama (n 76) 166.
238 As above.
239 As above.
240 Judgment R.Const. 2120 (n 164).
241 Judgment R.Const. 1879 (n 153).

chapter reveal that the Court rarely invokes international law of its own volition. A body of human rights treaties exists that could assist the Court in robustly interpreting the content of several rights.

Next, although it is not a common law jurisdiction, the Court resorts to its precedents to highlight its consistent position in relation to the admissibility of petitions. The discussion shows how litigants rely on the Court's precedents to buttress their arguments before the Court.

In the interpretation of substantive rights, evidence of judicial courage and restraint can also be observed. Firstly, the adjudication of equality and non-discrimination follows the formal nature of equality under the Constitution, since the Court did not go beyond formal equality. I demonstrated how a different reading of the right to equality could have enhanced women's political participation. Secondly, where the Court's jurisprudence continues to shine is in interpreting fair trial guarantees in a way that enhances the respect by political organs of the right to defence. Thirdly, the Court did not ensure that the Electoral Commission respects individuals' rights to vote, which is a cornerstone of participatory and representative democracy. The Court, in fact, rubber-stamped arguments presented by the Electoral Commission. Some policy arguments lead to the exclusion of certain individuals from running for President.

The pros and cons of the Court's interpretive approaches suggest that its judges have significant tools under the Constitution and the Bill of Rights by which to enhance a culture of human rights and tame executive authoritarianism where it surfaces. The absence of a general human rights jurisdiction might be an obstacle to wider protection of human rights. However, the Constitutional Court cannot exclude the possibility of construing an expansive jurisdiction using constitutional rules and principles. The existence of legislation that may conflict with the Constitution and which cannot be challenged before any other court, but the Constitutional Court can warrant a robustly progressive approach in which the Court expunges reactionary or *status quo* legislation from the Congolese legal landscape.